No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ISIDORO RODRIGUEZ, AND ISIDORO RODRIGUEZ-HAZBUN,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF STATE, THE OFFICE OF CHILDREN ISSUES; UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION; THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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This litigation concerns: (a) the prompt securing of a father's parental right to visitations under a valid Agreement as mandated by the General Assembly of the Commonwealth of Virginia, as well as by Congress; and, (b) the awarding of monetary damages due to malfeasance in office in furtherance of a criminal conspiracy with the common purpose of concealing the felony of obstructing the parental rights.

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE COURTS HAD JURISDICTION TO OBSTRUCT A FATHER/SON VISITATION RIGHTS?

II. WHETHER THE RIGHT TO OBTAIN A PETITION FOR A TRO/INJUNCTION AND WRIT OF MANDAMUS IS MOOT GIVEN THAT VA CODE § 20-146.1 *ET SEQ.*, IS EFFECTIVE UNTIL ISIDORO-SON BECOMES 18 YEARS OLD ON MARCH 10, 2007?

III. WHETHER THE RIGHT TO OBTAIN A PETITION FOR A TRO/INJUNCTION AND WRIT OF MANDAMUS UNDER THE TREATY AND ICARA IS *EQUITABLY TOLLED*, BECAUSE OF THE INTENTIONAL CRIMINAL VIOLATIONS OF 18 U.S.C. § 4, § 371, § 1001, § 1204?

IV. WHETHER THE SUMMARY ORDERS DISMISSING THE COMPLAINT ARE VALID GIVEN CONGRESS' ENACTMENT OF 28 U.S.C. § 455(b)(5)(i) & (iv)?

V. WHETHER THE SUMMARY ORDERS DISMISSING THE COMPLAINT ARE VALID GIVEN THE *VOID ORDER DOCTRINE*?

LIST OF PARTIES

Petitioner, Isidoro Rodriguez, Esq., in his own name and as next of friend, a resident of Alexandria, Virginia.

Petitioner, Isidoro Rodriguez-Hazbun is 16 years-old citizen of the United States, resident of Colombia.

Respondent Hon. Judge John G. Roberts, Chief Justice of the United States Supreme Court.

Respondent Hon. Judges of the United States Court of Appeals for the D. C. Cir., Washington, D.C..

Respondent Hon. Judge Douglas, H. Ginsburg, Chief Justice of the United States Court of Appeals for the D. C. Cir., Washington, D.C..

Respondent Hon. Judge Merrick B. Garland, Justice of the United States Court of Appeals for the D. C. Cir., Washington, D.C..

Respondent Hon. Judge Harry T. Edwards, Justice of the United States Court of Appeals for the D. C. Cir., Washington, D.C..

Respondent Hon. Judge Karen L. Henderson, Justice of the United States Court of Appeals for the D. C. Cir., Washington, D.C..

Respondent Hon. Judge Judith W. Rogers, Justice of the United States Court of Appeals for the D. C. Cir., Washington, D.C..

Respondent Hon. Judge John G. Roberts, Jr., Justice of the United States Court of Appeals for the D. C. Cir., Washington, D.C..

Respondent Hon. Judge Arthur, R. Randolph, Justice of the United States Court of Appeals for the D. C. Cir., Washington, D.C..

Respondent Hon. Judge David B. Sentelle, Justice of the United States Court of Appeals for the D. C. Cir., Washington, D.C..

Respondent Hon. Judge David S. Tatel, Justice of the United States Court of Appeals for the D. C. Cir., Washington, D.C..

Respondent Hon. Chief Judge Jane A. Restani, United States Court of International Trade, New York, NY.

Respondent Hon. Chief Judge Paul R. Michel, U.S. Court of Appeals for the Federal Cir., Washington, D.C.

Respondent Hon. Judge William H. Stafford, Jr., U.S. District Court for the N. D. Fl., Tallahassee Fl.

The Hon. Judges of the United States Court District Court for the District of Colombia, Washington, D.C.

Respondent Hon. Judge Richard W. Roberts, U.S. District Court for D.C., Washington, D.C..

Respondent Hon. Judges of the United States Court of Appeal for the Fourth Circuit, Richmond, Virginia.

Respondent Hon. Judge William W. Wilkins, Chief Justice of the United States Court of Appeal for the Fourth Circuit, Richmond, Virginia.

Respondent Hon. Judge William B. Traxler, Jr., Justice of the United States Court of Appeal for the Fourth Circuit, Richmond, Virginia.

Respondent Hon. Judge M. Blane Michael, Justice of the United States Court of Appeal for the Fourth Circuit, Richmond, Virginia.

Respondent he Hon Judges of the U. S. District Court for the E. D. of Va, Alexandria, Virginia.

Respondent Hon. Judge T.S. Ellis, III, U. S. District Court for the E. D. of Va, Alexandria, Virginia.

Respondent Hon. Judges of the Supreme Court of Virginia, Richmond, Virginia.

Respondent Hon. Judges of the Court of Appeals of Virginia, Richmond, Virginia.

Respondent Hon., Judge Rudolph Bumgardner, III, of the Court of Appeals of Virginia, Richmond, Virginia.

Respondent Hon. Judge D. Arthur Kelsey, of the Court of Appeals of Virginia, Richmond, Virginia.

Respondent Hon. Senior Judge William H. Hodges, of the Court of Appeals of Virginia, Richmond, Virginia.

Respondent Hon. Judges of the Fairfax County Circuit Court, Fairfax, Virginia.

Respondent Hon. Judge Stanley Paul Klein, of the Fairfax County Circuit Court, Fairfax, Virginia.

Respondent Hon Judge Langahorn Keith, Fairfax County Circuit Court, Chancellery, Fairfax, Virginia.

Respondent Hon. Judges of the Fairfax Court Juvenile & Domestic Relations District Court, Fairfax, Virginia.

Respondent Hon. Judge David S. Schell, the Fairfax Court Juvenile & Domestic Relations District Court, Fairfax, Virginia.

Respondent Hon. Judge Charles J. Maxfield, the Fairfax Court Juvenile & Domestic Relations District Court, Fairfax, Virginia.

Respondent Hon. Judge Thomas Peter Mann, Fairfax County J&D District Court, Fairfax, Virginia.

Respondent, the U. S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C.

Respondent, the United States Department of State, The Office of Children Issues, Bureau of Consular Affairs, Washington, D.C..

Respondent Ms. Mary B. Marshall Director Office of Children Issues United States Department of State; the Office of Legal Advisor for Consular Affairs, U.S. Department of State, Washington, D.C.

Respondent Mr. Robert McConnell, Executive Director, the Office of Legal Advisor for Consular Affairs, United States Department of State, Washington, D.C.

Respondent. Mr. Knute E. Malmborg, the Office of Legal Advisor for Consular Affairs, United States Department of State, Washington, D.C.

Respondent Estate of Chief Justice William Rehnquist, in his capacity as Circuit Justice for the U.S. Court of Appeals for the D.C. and Fourth Cir., Arlington, Virginia.

Respondent, the National Center for Missing & Exploited Children, Alexandria, Virginia.

Respondent International Centre for Missing & Exploited Children, Alexandria Virginia

Respondent Mr. Ernie Allen, President, the National Center for Missing & Exploited Children, Alexandria, Virginia.

Respondent Ms. Nancy Hammer, Esq., the National Center for Missing & Exploited Children, Alexandria, Virginia.

Respondent Ms. Susan Brinkerhoff, Esq., the National Center for Missing & Exploited Children, Alexandria, Virginia.

Respondent Mr. Guillermo Galarza, the National Center for Missing & Exploited Children, Alexandria, Virginia.

Respondent Law Firm of Proskauer Rose LLP, Washington, D.C..

Respondent Estate of Mr. Warren L. Denis, Esq., Fairfax, Virginia.

Respondent Law Firm Miles & Stockbridge LLP, Townsend, Maryland.

Respondent Stephen J. Cullen, Esq., Townsend, Maryland.

Respondent, Mr. Patrick H. Stiehm, Esq., Alexandria, Virginia.

Respondent Law Firm of Covington & Burling, Washington, D.C..

Respondent Mr. Eric H. Holder, Jr., Covington & Burling, Washington, D.C.

Respondent Ms. D. Jean Veta, Esq., Covington & Burling, Washington, D.C.

Respondent as yet Unknown John Does Individuals and Entities.

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TABLE OF CITED AUTHORITIES

Cases:

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The unpublished orders whose review are sought are: first, of the United States Court of Appeals for the District of Columbia dated November 21, 2005, reproduced at (A-3);[1] second, of the Designated Panel dated October 14, 2005, reproduced at (A-5); and, third, of District Judge Richard Roberts reproduced at (A-16 & A-17).

STATEMENT OF JURISDICTION

The unpublished order of the United States Court of Appeals for the District of Columbia was entered on November 21, 2005 (A-3). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT REQUIRED BY RULE 29.4

The Court is informed that 28 U.S.C. § 2403 applies and this Petition has been served upon the Solicitor General of the United States and the Attorney General of the Commonwealth of Virginia.

FEDERAL AND VIRGINIA STATUTES INVOLVED

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[1]In the Appendix, "(A-)" references to opinions below; and, the "(B-)" references are to the laws involved.

STATEMENT OF THE CASE

The initial Complaint was filed by Petitioner Isidoro Rodriguez-Hazbun ("Isidoro-Son"), and Isidoro Rodriguez ("Rodriguez-Father") on January 27, 2003, pursuant to the terms of and Joint Custody Settlement Agreement ("Agreement"), and as authorized by VA Code § 20-146.25, .29, and .35 of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Article 2, 11, 19, 20, 21, and 29 of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980 ("Treaty"), 42 U.S.C. § 11601(a) & § 11602(1) and (7) of the International Child Abduction Remedies Act ("ICARA"); and Congressional Joint Concurrent Resolution 293 of May 23, 2000 (B- 9), *Isidoro Rodriguez, father and next of friend of Isidoro Rodriguez-Hazbun, and Isidoro Rodriguez-Hazbun v. National*

Center for Missing and Exploited Children et al., U.S.D.C. Dist. Ct., No. 03-0120 (Judge Richard W. Roberts), so to:

(a) obtain the prompt securing of Rodriguez-father's visitation rights in Virginia with Isidoro-Son pursuant to the Agreement,[2] by the issuance of a writ of mandamus to the United States Department of State, United States Department of Justice, and their independent contractor acting as an "instrumentality of government," the National Center for Missing & Exploited Children ("NCMEC"), its employees and attorneys ("Executive Branch");[3] and,

(b) to obtain damages against the employees, agents, and attorneys of said entities in accordance with either the Federal Tort Claims Act, or *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for their use of illegal policies and practices to

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[2]The Agreement (A-59), was entered on August 1, 1997, under the laws of the Republic of Colombia, Civil Code Title XII, Article 253 and Article 264, *Legis*, ed. 2002, wherein both parents retained visitation and residual parental rights for Isidoro-son. On August 26, 1997, a Colombian Court exercised its limited jurisdiction to reconfirmed these parental and visitation rights (A-57). No complaint was ever entered by the Colombian Courts to modify, amend or revoke these residual and visitation rights.

[3]The NCMEC is under a Cooperative Agreement has received more than $300 million in contracts, grants and awards from the Federal government since 1984, in part to provide the administrative process in the United States for any petition under the Treaty, including to secure international visitation rights under Art. 21, Chapter IV of the Treaty, and 42 U.S.C. § 11601(a). After this action was filed, in March 2004, the NCMEC sought and obtained inclusion under the Federal Tort Claims Act.

avoid compliance with the ICARA, the Treaty, and Virginia UCCJEA, causing the shanghaiing of Isidoro-Son from the U.S.A. to the Republic of Colombia on June 11, 2002.

However, disregarding the Complaint and various motions seeking the prompt securing of visitation by the Executive Branch, District Judge Richard W. Roberts refused to act as required by Articles 2 & 11 of the Treaty and Va Code § 20-146.29, and did other administrative acts demonstrating his lack of impartiality.

A Petition for a Writ of Mandamus was filed with the United States Court of Appeals for the District of Columbia in April 2003, Docket No. 03-5092. But n July 1, 2003, all the justices of the U.S. Court of Appeals for D.C., including Chief Justice John G. Roberts, refused to compel the Executive Branch to promptly secure visitation.(A-54 & A-55).

In response to the refusal of the Federal Court to comply with the Va Code and Treaty, an action was filed by Isidoro-Son on June 13, 2003, and by Isidoro-father on December 14, 2004, in the Fairfax J&D Court. However, here too the judiciary refused to comply with the statutory mandates (A-A-53 and A-53

Based on this record of the concealment of a felony in assisting the obstructing of Rodriguez-father's parental rights in violation of 18 U.S.C. § 1204, on March 7, 2005, a First Amended Complaint was filed to add claims under the civil Racketeer Influenced and Corrupt Practices Act ("RICO"), and added as defendants District Judge Richard W. Roberts and Judge T.S. Ellis, III, the justice of the U.S. Court of Appeals for the 4th & D.C. Cir., including Justice John G. Roberts, Chief Justice William Rehnquist as Cir. Justice of the 4th and D.C. Cir., and the judges of the

Virginia Courts, based on their acts outside of their limited jurisdiction under Art. 19 of the Treaty and 42 U.S.C. § 11603(d).

Then on March 31, 2005, after over two years not complying with VA Code 20-146.35, and Art. 2 and 11 of the Treaty, Defendant Judge Richard W. Roberts refused to disqualify himself as mandated by 28 U.S.C. § 455(b)(5)(i) & (iv), declared himself absolutely immune from the suit, and ruled that the mandamus action filed since January 27, 2003 under the Treaty and VA Code as moot, and dismissed the Complaint, and struck the First Amended Complaint.

A motion for TRO/Injunction and Writ of Mandamus to secure visitation for the Summer of 2005, and motion to disqualify, were filed on March 15. On April 6, 2005, a Notice of Appeal was filed with the Defendant Ct of Appeals for D.C., Docket No. 05-545.

On August 1, 2005, although Defendant Chief Justice William H. Rehnquist did comply 28 U.S.C. § 455(b)(5)(i) & (iv), § 291, & § 292 (b-3), he did not comply with 28 U.S.C. § 3 (B-3), by his allegedly rising from his death bed to handpick judges to be on the designate a panel deciding this action in lieu of defendant justices of the U.S. Court of Appeals for the D.C. Cir. Also on this date Justice John G. Roberts issued to the U.S. Senate a statement on the instant action (Exhibit B-12),[4] ,

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[4]Chief Justice John G. Roberts did intentionally conceal material facts regarding the Complaint and the First Amended Complaint. He intentionally described this litigation as being only about a father's lawsuit for custody, and not about the expeditious securing of visitation under the Art. 21 of the Treaty and VA Code § 20-146.25, and for compensatory and punitive damages under RICO, and *Bivens*, for unlawful acts in violation

and the Clerk's Office consolidated the Petition for TRO/Injunction and Writ of Mandamus, and order the filing out of time of the motion to dismiss the appeal based on the cynical argument that because Isidoro-son became 16 years old on March 10, 2005, the Executive Branch's duty under the Treaty no longer applied.

On October 14, 2005, the Designated Panel issued an order without permitting the filing of briefs–to summarily dismissed as moot the motion for TRO/Injunction and Writ of Mandamus, and the appeal. No consideration was given to rights under Va Code(A-5). On November 21, 2005, Defendant justices of the Court of Appeal denied a rehearing *En Banc* (A-3).

On October 28, 2005 U.S. Supreme Court Docket No. 05-545, was filed seeking a TRO/Injunction and Writ of Mandamus to secure visitation under the Va Code and Treaty for Christmas 2005. Sometime thereafter Defendant Chief Justice John G. Roberts disqualified himself pursuant to 28 USC § 455(b)((5)(i) & (iv), and pursuant to 28 U.S.C. § 3, to authorize Associate Justice Paul Stevens to act in his place. On December 7, 2005, Justice Stevens denied the TRO/Injunction, and on January 6, 2006, the full Court denied granting the writ of mandamus to compel compliance with the Va Code and Treaty.

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of parental rights under VA Code, the Treaty, 18 U.S.C. § 4, § 1001, § 1204. Also the Senate was not advised of the June 15, 2005, filing of Notice of Federal Tort Claims against Chief Justice Roberts for acts of negligent omission in furtherance of the obstructing of parental rights of Rodriguez-father since the Summer of 2003, in violation of 18 U.S.C. § 1204.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE PETITION MUST BE GRANTED BECAUSE THE COURTS ARE WITHOUT JURISDICTION TO OBSTRUCT VALID PARENTAL RIGHTS UNDER THE AGREEMENT.

At the outset pursuant to Virginia's UCCJEA Va. Code § 20-146.4 (B-3),[5] and Articles 19 of the Treaty (B-5), and 42 U.S.C. § 11601(b)(4)(B-7), both the Federal and Virginia Courts have been authorized only limited jurisdiction to act promptly enforce the visitation rights under the Agreement (A-59), as confirmed by the Colombian Court (A-57).

But in the instant action, Judge R. Roberts and the Designated Panel disregarded these limits on their jurisdiction and judicial capacity by violating the jurisdictional limitations of VA Code § 20-146.4(A) & (B), Article 19 of the Treaty, 42 U.S.C. § 11601(b)(4), to hold that to grant visitation would by using Judge Ellis order (A-48 and A-10).[6]

They exceeded their jurisdiction and judicial capacity by striping Rodriguez-father of substantive right under the Agreement entered by the Colombian Courts (A-59 and A-60). VA "Code, the Treaty, and ICARA, clearly

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[5]Under this section the decision of the Colombian Courts shall be treated as if as if it were decision of a court of a state of the United States, and "must be recognized and enforced."

[6]"[if] angels were to govern men, neither external nor internal controls on government would be necessary." Federalist Paper No. 51, published Bill of Rights in U.S. Constitution.

state that Judge Ellis III decision to return of Isidoro-son to Colombia, "shall not be taken to be a determination on the merits" of Rodriguez-father's right to visitation.

In sum the U.S. Courts of Appeal for the District of Columbia Circuit (A-3), the Designated Panel (A-5), District Judge Richard W. Roberts (A-17 and A-18), District Judge Ellis III,[7] the Supreme Court of Virginia (A-53), the Court of Appeals of Virginia, Fairfax J&D Court Judge Thomas Mann (A-52), had no jurisdiction to deprive Rodriguez-father of his residual and visitation rights under the Agreement (A-59), that were to be secured under Va Code § 20-146.25, .29, and .35 (B-4), and Articles 21 of the Treaty (B-5), and 42 U.S.C. § 11601(a)(4)(B-6), *see* Congressional Concurrent Joint Resolution 293, May 23, 2000 (B-9).[8]

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[7] Additionally in *Escaf v. Rodriguez*, 200 F.Supp. 2d 603 (E.D. Va. 2002), Judge Ellis III, and Judge Richard W. Roberts in the instant action, acted outside of their judicial capacity in violation of 18 U.S.C. § 4 and § 371, by their conspiring to prevent a government official from performing his or her duty under the Treaty so to implement the illegal policies and practices of the Executive Branch disregarding the Congressional mandate of the concurrent jurisdiction of Fairfax County J&D Court under the Article 29 of the Treaty and VA Code § 20-146.1 *et seq.*; and, disregarding all the other exception under Article 13 and 20 of the Treaty, and rights under VA Code § 20-146.1 et seq.

[8] Under the Rules Enabling Act, 28 U.S.C. § 2072(b), both District Judges Ellis III and Richard W. Roberts, were prohibited by Congress from depriving Rodriguez-father and Isidoro-Son, of "any substantive right," i.e. their right to visitation, the right to the protection of the United States.

Consequently, the Defendant jurists respective orders surreally stripping Rodriguez-father of his parental rights of visitation under the Agreement (A-59), are illegal violation of 18 U.S.C. § 18 U.S.C. § 4, § 1001, § 1204,[9] (B-2), and well as 18 U.S.C. § 371, without legal effect and are void.[10]

II. THE PETITION FOR A TRO/INJUNCTION AND WRIT OF MANDAMUS TO COMPEL COMPLIANCE WITH VIRGINIA'S UCCJEA MUST BE GRANTED BECAUSE PETITIONERS' HAVE THE RIGHT TO SECURE VISITATION UNTIL ISIDORO-SON IS 18 YEARS OLD ON MARCH 10, 2007.

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[9]The Courts have held that 18 U.S.C. § 1204 criminalizes removal of a child from the United States "with intent to obstruct lawful exercise of parental rights" and would apply to obstruction of father's visitation rights. *In re Extradition of Schweidenback*, 3 F.Supp2d 118 (1998, DC Mass); 18 U.S.C. § 1204 applies to protection of visitation rights under State law which categorizes "visiting rights" as "parental rights," *United States v. Alahmad*, 211 F.3d 538, 2000 *Colo JCAR* 2472 (CA10 Colo., 2000). Even Judge Ellis III, recently held that the retention of a U.S. citizen child outside of the United States in violation of custody rights would be a violation of 18 U.S.C. § 1204, *United States v. Shahani-Jahromi*, 289 F.Supp2d 723 (ED Va, 2003).

[10]These duties to enforce the terms of the Agreement by the securing visitation could only be terminated if Rodriguez-father parental rights had been altered by a Colombian Court, if a new action had been filed to provide it jurisdiction under the Colombian Civil Code. This never occurred.

Pursuant to Virginia UCCJEA Va. Code § 20-146.1,[11] Rodriguez-father and Isidoro-Son's cause of action for access to the courts to secure visitation is that their rights are effective until Isidoro-Son's 18th birthday on March 10, 2007.[12]

However, the record below shows that in furtherance of a conspiracy in violation of 18 U.S.C. § 4, § 371, § 1001, and § 1204, as well as RICO, the illegal policies and practices the Executive Branch, Defendant jurists acted in collusion to disregard their judicial duties under the Supremacy Clause, Article VI, Clause 2, and the Fifth, Ninth, and Fourteenth Amendments to the Constitution, VA

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[11]VA Code § 20-146.1 Definitions. In this act: "Child" means individual who has not attained eighteen years of age.

[12]Access to justice is so fundamental that this Court has held that the Fourteenth Amendment includes, "the duty of every State to provide, in the administration of justice, for the redress of private wrongs." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). This Court has left no doubt that access to impartial court is a fundamental right guaranteed by the U.S. Constitution to secure rights under: (a) The First Amendment Petition Clause - *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); (b) The Fifth Amendment Due Process Clause - *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 335 (1985); (c) The Fourteenth Amendment Equal Protection Clause - *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); and, (d) The Fourteenth Amendment Due Process Clause - *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974); *Terry E. Butera v. District of Columbia et al.*, 235 F.3d 637 (2001); *see* Christopher *v. Harbury*, 536 U.S. 403, Sct. 01-394 (2002).

Code § 20-146.1 *et seq.*, the Treaty, and ICARA, *see* Congressional Resolution 293 of March 2000.[13]

It is for this reason that, "[t]here is no crueler tyranny than that which is exercised under cover of law, and with the colors of justice ..."– *U.S. vs. Jannottie*, 673 F.2d 578, 614 (3d Cir. 1982).

For this reason although judges do enjoy a form of absolute immunity from suit, they do so only when the judge has jurisdiction over the subject matter and is performing a judicial act. *Forrester v. White*, 484 U.S. 219, 98 L.Ed. 2d 555.

Thus although these jurists may incur no criminal liability in neglecting to perform a mandatory duty imposed upon them by statute *see Braatelien v. United States* 147 F2d 888 (CA 8 ND), because 18 U.S.C. § 1204 makes it a crime to obstruct with the parental rights of a father the conspiracy to aid in the concealment of a felony is a violations of 18 U.S.C. § 4, § 371, and §1001, these jurist may be indicted and tried for the criminal offence without first being impeached and convicted by Congress, *see Claiborne v. United States*, 465 U.S. 1305, 79 L.Ed.2d 665.

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[13]When it was Isidoro-son when 13 year-old he requested that a petition to modify the Agreement (A-59), pursuant to Article 29 of the Treaty (B-6), and Va Code § 20-146.4(C)(B-4), based on his fundamental rights and "best interests" as a U.S. citizen, his preference to reside in Virginia with Rodriguez-father, and his concern for his safety because of the increasing violence in Colombia against U.S. citizens, *Isidoro Rodriguez-Hazbun v. Amalin Hazbun*, Fairfax County J&D Court (July 13, 2001, No. JJ347050-01-03).

Thus because this Court has held that even a minimal infringement upon Constitutional civil rights, constitutes irreparable injury sufficient to justify injunctive relief, *Elrod v. Burns*, 427 U.S. 347 (1976), and that judicial immunity does not extend to civil rights actions seeking prospective injunctive relief against judicial acts of state court judges. *Pulliam v. Allen*, 466 U.S. 522, 80 L.Ed. 2d 565; *Stephens v. Herring* (Ed Va) 827 F.Supp 359, the action to enforce visitation rights under VA Code § 20-146.25, is not moot.

III. BASED ON THE DOCTRINE OF *"EQUITABLY TOLLING,"* AND THE ACTS OF FRAUDULENT MALFEASANCE SINCE JANUARY 27, 2003, VIOLATING 18 U.S.C. § 4, § 371, § 1001, § 1204, THE PETITION FOR A TRO/INJUNCTION AND WRIT OF MANDAMUS TO COMPEL THE EXECUTIVE AND JUDICIAL BRANCH TO SECURE VISITATION PURSUANT TO THE TREATY AND ICARA, IS NOT MOOT AND MUST BE GRANTED.

From January 27, 2003 to July 14, 2005, the Executive Branch could not raise the defense that the timely filed action to secure visitation rights under the VA Code and Treaty was moot.

In this context, Courts have held that statute of limitations is an affirmative defense subject to waiver. *See*, e.g. *Nardi v. Stewart*, 354 F.3d 1134 (9th Cir. 2004)(the state waives its statute of limitation defense by filing a responsive pleading that fails to affirmatively set forth the defense); *Robinson v. Johnson*, 313 f.3rd 128, 137 (3rd Cir. 2002)(opinion on panel rehearing)(affirmative defenses such as statute of limitations must be raised at the earliest practicable moment.)

Disregarding the facts and law, and without any legal or factual justification, on August 1, 2005, the Designated Panel granted the filing out of time of the motion for summary affirmance seeking to dismiss the action for a TRO/Injunction and Writ of Mandamus filed in 2003, based on the argument that now that Isidoro-Son was 16 years-old, Rodriguez-father and Isidoro-Son's right of action under Article 4 of the Treaty was moot.[14] However, the Executive Branch did not challenge the cause of action under VA Code since Rodriguez-father and Isidoro-Son have a valid cause of action until March 10, 2007, when Isidoro-Son becomes 18 years-old.

Although the action TRO/Injunction and Writ of Mandamus was consolidated with the Appeal filed on May 25, 2005, the Designated Panel denied the right of filing of any brief ordered the appeal moot (A-6 and A-47).

This record confirms that from the commencement of this action when Isidoro-Son was but 13 years-old over three years ago on January 27, 2003, the Executive and Judicial Branches of Federal Government, as well as the Courts of Virginia intentionally violated 18 U.S.C. § 1204, so to conceal the obstructing with Rodriguez-father parental rights of visitation under the Treaty. The record confirms that these jurist permitted the filing of false responsive pleading by the Executive Branch in violation of 18 U.S.C. § 1001, in furtherance of a criminal conspiracy in violation of 18 U.S.C. § 4 and § 371.

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[14]Art. 4 states, "The Convention shall apply to any child who has habitually resided in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years."

Based on this extraordinary record the Executive Branch must be required to assist in the securing of visitation rights under Virginia's UCCJEA Va Code § 20-146.25-as it should have done under the Treaty.

Because limitations period are customarily subject to *equitable tolling* unless tolling would be inconsistent with the relevant statute, *Young v. United States*, 535 U.S. 43, 49 (2002).

Access to an impartial court, Chief Justice Marshall declared in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), is,

> [T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Due process in access to an impartial court consists of "**those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,**" *Hurtado v. California*, 110 U.S. 516, 535 (1884)(Emphasis added); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

The record here establishes that Rodriguez-father and Isidoro-son have been denied for at least the past three years access to an impartial judiciary to compel the Executive Branch to secure promptly their visitation rights under the Agreement, *see also*, 42 U.S.C. § 11602(7), pursuant to VA Code §§ 20-146.25, .29, and .35 and Articles 21 of the Treaty.

Therefore the Designated Panel's holding that the "time of the events underlying this petition has passed," is legal sophistry to assume away the delaying tactics of the Executive Branch and Judge Richard W. Roberts.[15]

Furthermore, the order denying Rehearing *En Banc*, is not only a violation of 28 U.S.C. § 455(b)(5)(i) & (iv), and § 291, but to confirms the pattern and practices of the United States Court of Appeals of the District of Columbia demonstrated in *Foretich v. United States,* Civ. Action No. 97-0929 (D.D.C. Jan 13, 2002), reversed on appeal, 351 F3d 1198 (D.C.C.A. No-02-5224, December 16, 2003),[16] to violate the civil rights of fathers by staying proceeding until a statute of limitation has run and to declare the action moot.

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[15]The impartiality of the Designated Panel is challenged under 28 U.S.C. § 455(a), because not only did defendant Chief Justice Rehnquist ignore 28 U.S.C. § 3, to obviously "handpicked" the judges on the Designated Panel to include: one who was under his direct control as Circuit Judge of the D.C. Circuit, one who had served as his law clerk, and married to the Defendant in *Foretich v. United States,* Civ. Action No. 97-0929 (D.D.C. Jan 13, 2002)(see discusion below), and one who was working very closely with the Defendant DOJ on anti-terrorist issues. Thus defendant Chief Justice Rehnquist is liable for his non-judicial acts in his administrative capacity, 46 AmJur 2d § 76, *see Mirles v. Waco*, 502 U.S. 9, 116 L.Ed. 2d 9; *Forrester v. White,* 484 U.S. 219, 98 L.Ed. 2d 555.

[16]In *Foretich id*, the courts delayed consideration of the merits of the father's claim filed in 1997, for over fourt years until 2001, when the minor child had reached her 18th birthday, and the father's rights ended. Given that one of the members of the Designated Panel is married to the wife in that action, his impartiality would be a concern to any objective observer.

Thus here too Judge Richard W. Roberts, the Designated Panel, and the Court of Appeals seek to close the courthouse doors based on asserting the issue of compliance with the VA Code & Treaty is moot, so to prevent Rodriguez-father and Isidoro-son from walking through them to claim the obstruction of Rodriguez-father's parental rights in violation of 18 U.S.C. § 4, § 371, § 1001, and 1204, since January 27, 2003

It is for this reason that the ongoing violation of ministerial and judicial duties, as well as illegal acts since January 27, 2003, that the Executive Branch's obligation to secure visitations under Article 21 of the Treaty has not run, although Isidoro-son became 16 years-old on March 10, 2005. The duty under the Treaty is tolled and remains in effect until Isidoro-son is 18 years old, to coincide with VA Code § 20-146.1, ,25 and .29.[17] As stated above, this Court has held that even a minimal infringement upon Constitutional civil rights, constitutes irreparable injury sufficient to justify injunctive relief, thus it must enjoin further illegal act the Executive and Judicial Branches of Government. *See Elrod v. Burns*, 427 U.S. 347 (1976).

IV. THE PETITION MUST BE GRANTED TO DECLARE AS INVALID THE ORDERS ISSUED IN DEFIANCE OF CONGRESS' MANDATE UNDER 28 U.S.C. § 455(b)(5)(i) & (iv).

Although there is no case law on the issue of malfeasance of office due to the obstructing of a father's

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[17] The Judge Richard W. Roberts, the Designated Panel, and the Court of Appeals for the District of Columbia Circuit disregarded the duty to secure Rodriguez-father's visitation right under VA Code § 20-146.1 & .25, until Isidoro-Son is 18 years-old

parental right in further of a criminal conspiracy to violating the right of access to an impartial court to petition the government regarding their illegal policies and practices to deny visitation rights under the Treaty and VA Code § 20-146.1 *et seq.*, it is clear from the wording of 18 U.S.C. § 4, § 371, § 1001, and § 1204, that compliance is not a prerogative of the courts under these criminal statutes.

Obviously by logic, as well as natural law, these jurists who allegedly are involved in these criminal acts are disqualified.[18]

Also pursuant to 28 U.S.C. § 455(b)(i) & (iv), these jurists who are defendant must be disqualified from consideration of this action, because when Congress amended § 455 in 1974 to create an objective standard for the recusal or disqualification of judges, Congress' intent was to "promote public confidence in the impartiality of the judicial process . . . " H.R. Rep. No. 93-1453, 1974 at 6355.

> Subsection (b) of the amended statute sets forth specific situations or circumstances ***when the judge must disqualify himself*** . . . by setting specific standards, Congress can eliminate the uncertainty and ambiguity arising from the language in existing

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[18]Disqualification of these jurists is mandated under the doctrines of *nemo judex in parte sua* and *audi alteram partem*, made applicable to federal judges under the Ninth Amendment. These principles of natural justice were derived from the Romans who believed that some legal principles were "natural" or self-evident and did not require a statutory basis. As such, they are indelibly imbedded in the common law and may not be disparaged by Constitutional actors without doing violence to the fundamental rights existing before the U.S. Constitution was ratified, and protected by the Ninth Amendment (B-1).

> statute and will have aided the judges in avoiding possible criticisms for failure to disqualify themselves. (Emphasis added) H.R. Rep. 93-1453, *supra.*

This was confirmed by even Chief Justice Rehnquist in discussing the import of 28 U.S.C. § 455(b), in his dissent, in *Lilyeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 871 (1988) that:

> Subsection (b) of § 455 sets forth more ***particularized situations in which a judge must disqualify himself.*** Congress intended the provisions of § 455 (b) to remove any doubt about recusal in cases where a judge's interest is too closely connected with the litigation to allow his participation.(Emphasis added)

Therefore the plain language of 28 U.S.C. 455(b)(5)(i) & (iv), clearly states that any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding when he is a party to the proceeding, or to his knowledge likely to be a material witness in the proceeding.

This force of the mandate of Congress for these jurists to disqualify themselves once named as a defendant is underscored by 28 U.S.C. §455(e) which states: "No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)."

Clearly, Congress does not want justices hearing cases to which they are either a named defendant or will be a witness, since §455(a), states that, "[a]ny justice, . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Therefore, pursuant to congressional mandate, District Judge Richard W. Roberts, and the justice of the United States Court of Appeals for the District of Columbia, including newly confirmed Chief Justice John Roberts, had to disqualify themselves from the consideration of either the merits of the First Amended Complaint filed or the appeal because:

First, these jurists are named defendants, and will be called as witnesses, in "the proceeding" for their acts of malfeasance outside of their jurisdiction and judicial capacity by aiding the obstruction of Rodriguez-father's parental rights in violation of 18 U.S.C. § 4, § 371, § 1001, and § 1204.

Second, all of these jurists have been named Defendant in the Notice of Federal Tort Claim Act ("FTCA) filed on June 15, 2005.

Finally, this Court has addressed the issue of disqualification where many judges are involved in *United States v. Will*, 449 U.S. 200, 213 (1980). However, in the instant action none of the defendant jurists can invoke the *Rule of Necessity* because the factual predicate present in *Will* are not present, and 28 U.S.C. § 3, § 291, and § 292 apply, herein these jurists disqualified from a particular case by reason of § 455(b)(5)(i) & (iv), simply steps aside and allows the normal administrative processes of the court to assign the case to another judge not disqualified.

Thus, the record below confirms that both Chief Justices implemented their authority under 28 U.S.C. § 3, § 291, and § 292, to authorize the Designated, as well as to

authorize Associate Justice Paul Stevens to act.[19] Also defendant appellate jurists disqualified themselves.

Consequently, District Judge Richard W. Roberts was also required to disqualify himself pursuant to 28 U.S.C. § 455(b)(5)(i) & (iv). Because he refused to comply with the mandate, his order is *void*, and the entire case must be remanded for a full jury trial under RICO and *Bivnes,* and a bench trial under the FTCA, on the First Amended Complaint (and pending to be filed Second Amended Complaint to include the FTCA notice of June 15, 2005).

V. BASED ON THE 'VOID ORDER DOCTRINE," THE PETITION MUST BE GRANTED.

The Supreme Court has held that a void can be attacked in any proceeding where the judgment come into issue. *Pennoyer v. Neff,* 95 US 714 (1877); and, *Jordon v. Gilligan*, 500 F.2d 701, 710 (6th Cir. 1974)("a void judgment is no judgment at all and is without legal effect")(Emphases added).

A void judgment is not entitled to the respect accorded a valid adjudication. All proceedings founded on the void judgment are themselves regarded as invalid. A void judgment is regarded as a nullity, and the situation is the same as it would be if there were no judgment. 30A Am Jur Judgments §§ 43, 44, 45. It is attended by none of the consequences of a valid adjudication. It has no legal or binding force or efficacy for any purpose or at any place. It

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[19] In S. Ct. Docket No. 05-545, Justice Paul Stevens issued the orders in place of Chief Justice John G. Roberts, who is the 4th and DC Circuits Judge.

is not entitled to enforcement. All proceedings founded on the void judgment are themselves regarded as invalid. 30A Am Jur Judgments § 44, 45.

In the instant action, Judge R. Roberts and the Designated Panel disregarded the limits on their jurisdiction and judicial capacity by violating VA Code § 20-146.4(A) & (B), and Article 19 of the Treaty, to hold that to grant visitation would by using Judge Ellis order (A-48 and A-10). This exceeded their jurisdiction and judicial capacity because they striped Rodriguez-father of substantive right under the Agreement entered by the Colombian Courts (A-59 and A-60). Therefore these orders are void, or voidable, and can be attacked in this proceeding where their judgments come into issue. *Pennoyer v. Neff,* 95 US 714, 24 L ed 565 (1877); *Thompson v. Whitman,* 18 Wall 457, 21 l ED 897 (1873); *Jordon v. Gilligan,* 500 F.2d 701, 710 (6th Cir. 1974)(" a void judgment is no judgment at all and is without legal effect."); *Lubben v. Selective Service System Local Bd. No. 27,* 453 F.2d 645 (1st Cir. 1972).

The Supreme Court's void order doctrine provides that Rodriguez had and has a right to have void orders addressed and attacked in any proceeding in any court where the validity of the judgment comes into issue, because an illegal order is forever void. An order that exceeds the jurisdiction of the court, is void, or voidable, and can be attacked in any proceeding in any court where the validity of the judgment comes into issue. *see* Rose v. Himely, 4 Cranch 241, 2 L ed 608 (1808); *Windsor v. McVeigh,* 93 US 274, 23 L ed 914 (1876); *McDonald v. Mabee* 243 US 90, 37 Sct 343, 61 L ed 608 (1917).

The District Judge Richard W. Roberts and the Designated Panel's orders attempt to place a veil of legality on the acts obstructing the fundamental parental rights of

Rodriguez-father under the Agreement, as well as Isidoro-son fundamental rights as a U.S. citizen, by citing Judge Ellis III order is pure legal sophistry since in his order denied the existence of fundamental rights not by citing any case precedent, but instead citing the defendant U.S. State Departments comments. Surreally this in itself establish their violating meaningful access to an impartial courts by their acting outside their authority and violating 18 U.S.C. § 1204 and § 4, so to obfuscate the violations of Article 19 of the Treaty, and 42 U.S.C. § 11601(b)(4) for the past three years by Respondents' refusal to secure the rights of visitation under the Agreement, pursuant to the Article 21 of the Treaty and VA Code § 20-146.25 and .29.

Thus the orders are void.

Finally, at the core of the due process clause is the right to notice and a hearing "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). "Ordinarily, due process of law requires an opportunity for "some kind of hearing" prior to the deprivation of a significant right. *Memphis Light, Gas & Water Div. v. Craft*, 346 U.S. 1, 19 (1978); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971).

Here there has been no hearing to consider either the VA Code or Treaty, in either Federal or State Courts, thereby violating Rodriguez-father's right to due process and equal protection of the laws in his substantive rights as a father under the Agreement.

Thus the orders must be reconsidered and set aside as being in excess of the judicial authority and capacity in violation of the above cited laws, *U.S. v. Holtzman*, 762 F.2d 720 (9th Cir. 1985).

CONCLUSION AND RELIEF SOUGHT

Since his being shanghaied to Colombia on June 11, 2002, by the illegal actions of the Executive Branch and Judicial Branches of Federal Government, and the Virginia Courts, acting outside of their jurisdiction, as well as judicial and ministerial capacity, Isidoro-son has been unlawfully deprived of his fundamental rights as a United States citizen. In addition for over three years Rodriguez-father and Isidoro-son have been illegally denied their right to visitation under the Treaty and VA Code by the on going malfeasance in office in violations of 18 U.S.C. § 4, § 371, and §1001, by aiding in the obstructing of Rodriguez-father parental rights in violation of 18 U.S.C. § 1204.

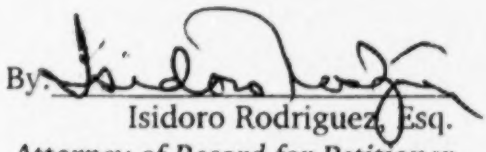
Yet these defendant jurists surreally declare these fundamental Constitutional and statutory issues moot, based on their judicial "rope-a-dope" for four and obfuscation! But neither the cause of action to compel compliance with the mandates of Congress and the General Assembly of Virginia, nor for depriving U.S. citizens of their rights due to acts of malfeasance in office are moot.

If these jurists are permitted to disregard the substantive rights of my son and I as citizens of the United States, as well rights under the Treaty, Federal and State Statute, with impunity and deny us the ability to challenge their actions, then they have unlimited power, and"[u]nlimited power is apt to corrupt the minds of those who possess it; and . . . , that where law ends, tyranny begins."Lord Chatham (William Pitt) to the British House of Lords in January 1770.

However, our Constitution created a limited government. Therefore, this Court must grant certiorari.

Dated: February 18, 2006

Respectfully submitted,

By: 

Isidoro Rodriguez, Esq.
Attorney of Record for Petitioner
Admission to the Bar of
The United States Supreme Court 1992

THE LAW OFFICES OF ISIDORO RODRIGUEZ
2304 Farrington Avenue
Alexandria, Virginia 22303-1520
Telephone: 703.960.0225

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ISIDORO RODRIGUEZ, AND ISIDORO RODRIGUEZ-HAZBUN,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF STATE, THE OFFICE OF CHILDREN ISSUES; UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION; THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

APPENDIX

Isidoro Rodriguez, Esq.
Counsel for Petitioners
THE LAW OFFICES OF ISIDORO RODRIGUEZ
2304 Farrington Avenue
Alexandria, Virginia 22303-1520
(703)317-0526; E-mail: isidoro@earthlink.net

TABLE OF CONTENT OF APPENDIX

U.S. CONSTITUTION, TREATY, FEDERAL STATUTES/ REGULATION AND CODE OF VIRGINIA INVOLVED

The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501

The International Child Abduction Remedies Act

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 9, 2006

Mr. Isidoro Rodriguez
2304 Farrington Avenue
Alexandria, VA 22303-1520

Re: In Re Isidoro Rodriguez
No. 05-545

Dear Mr. Rodriguez:

The Court today entered the following order in the above entitled case:

The petition for writ of mandamus is denied., The Chief Justice took no part in the consideration or decision of this petition.

Sincerely,

/s/_____
William K. Suter, Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 7, 2005

Mr. Isidoro Rodriguez
2304 Farrington Avenue
Alexandria, VA 22303-1520

Re: In Re Isidoro Rodriguez, Applicant
Application No. 05A526

Dear Mr. Rodriguez:

The application for temporary restraining order/preliminary injunction in the above-entitled case has been presented to Justice Stevens, who on December 7, 205 denied the application.

This letter has been sent to those designated on the attached notification list

Sincerely,
William K. Suter, Clerk
by /s/_____
Troy D. Cahill
Staff Attorney

UNITED STATE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5130 September Term, 2005
O3cvOOl20
Filed on: Nov. 21, 2005)

In re: Isidoro Rodriguez and as father and next of friend of his 16 year old son Isidoro Rodriguez-Hazbun and Isidoro Rodriguez Hazbun,

Petitioners

Consolidated with 05-5202

ORDER

Appellants complaint filed in the district court on January 27, 2003, named all the sitting judges of this court as defendants. Accordingly, these cases were assigned to three judges from the United States Court of Appeals for the Federal Circuit, the Untied States Court of International Trade, and the United States District Court for the Northern District of Florida, sitting by designation. On October 28, 2005, appellants filed a petition for rehearing en banc in No. 05-5202, styled as a petition for designated panel's summary dismissal on October 14, 2005, of the appeal of the denial of visitation under a joint custody agreement, VA Code 20-146.1 et seq., statute, and the treaty, as well as the denial of damages," (sic) and a motion for recusal in No. 05-5202, styled "motion pursuant to 28 U.S.C. 455(a) and (b) to disqualify the judges of this Court of Appeals and judges of this circuit, the judges of the designated panel, and the judges of the 4th Circuit from consideration of the

petition for rehearing en banc of the designated panel's summary dismissal on October 14, 2005, of the appeal of the denial of visitation under a joint custody agreement, VA Code 20-146.1 et seq., Statute, and the Treaty, as well as the denial of damages, and for the appointment of an "impartial" special panel selected from outside this 4th Circuit." (sic) Upon consideration of appellants petition for rehearing en banc and motion for recusal, and there being no judges of this court available to constitute an en banc court, it is

ORDERED that the petition for rehearing en banc be dismissed as moot. It is

FURTHER ORDERED that the motion for recusal be dismissed as moot.

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/_____
Nancy G. Dunn

UNITED STATE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5130
September Term, 2005
O3cvOOl20

Filed on: (Seal-Oct. 14, 2005)

In re: Isidoro Rodriguez and as father and next of friend of his 16 year old son Isidoro Rodriguez-Hazbun and Isidoro Rodriguez Hazbun,

Petitioners,

Consolidated with 05-5202

BEFORE: Michel, Chief Judge,* Restani, Chief Judge,** and Stafford, Senior District Judge**

ORDER

Upon Consideration of (1) Rodriguez's petition in No. 05-5130 "for temporary restraining order or preliminary injunction and writ of mandamus;" (2) Rodriguez's motion for expedited consideration of the petition in No. 05-5130; (3) Rodriguez's motion in No. 05-5130 "to disqualify the judges of the court of appeals from these matters and for the appointment of a special panel selected from outside of the District of Columbia and Fourth Circuits;" and (4) certain private appellees' and the Virginia State appellees' motions in No. 05-5202 for summary affirmance, the responses to each of these motions if submitted, and the replies if submitted, it is

ORDERED that Rodriguez's petition for a temporary restraining order or preliminary injunction and writ of mandamus and his motion for expedited consideration thereof be, and hereby are, denied as moot because (1) the time of the events underlying his petition has passed; and (2) we reach the merits of whether the district court abused its discretion when it declined to issue a writ of mandamus in disposing of the motion for summary affirmance; and (3) expedited consideration has been granted. It is

FURTHER ORDERED that Rodriguez's motion for disqualification and "appointment" be, and hereby is, denied as moot because Chief Justice William H. Rehnquist[1] designated the judges of this special panel, each of whom sit outside of the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Court of Appeals for the Fourth Circuit, to hear and decide Rodriguez's appeal. It is

FURTHER ORDERED that the motions for summary affirmance be, and hereby are, granted for the reasons set forth in the accompanying memorandum. We conclude that briefing and oral argument would not assist the court in deciding Rodriguez's consolidated appeal. Additionally, summary disposition of this appeal is appropriate because on every issue, the merits are so clear as a matter of law that no substantial question regarding their proper disposition exists. See Tax Davers Watchdog. Inc. v. Stanley, 819 F.2d 294, 297(D.C. Cir. 1987) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be

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[1]Chief Justice Rehnquist died on September 3, 2005 after having served as Chief Justice of the United States since September 26, 1986.

published. The Clerk is directed to withhold issuance of the mandate in Appeal No. 05-5202, the direct appeal, until seven days after resolution of any timely petition for rehearing.[2] See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
John T. Haley
Deputy Clerk

*Chief Judge Michel is a judge of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

**Chief Judge Restani is a judge of the United States Court of International Trade, sitting by designation pursuant to 28 U.S.C. § 293(a).

***Senior District Judge Stafford is a judge of the United States District Court for the Northern District of Florida, sitting by designation pursuant to 28 U.S.C. § 292(d).

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[2]As No. 05-5130 is an original action filed in the United States Court of Appeals for the District of Columbia Circuit, no mandate will issue

No. 05-51 30, et. al., In re Rodriguez

MEMORANDUM

I. BACKGROUND

Isidoro Rodriguez ("Rodriguez") brought suit in the United States District Court for the District of Columbia on behalf of himself and his minor son, Isidoro Rodriguez- Hazbun ("Isidoro"), against the National Center for Missing and Exploited Children, et. al.,[3] alleging that the defendants conspired to deprive him of his constitutional rights under the First, Fifth, and Ninth Amendments and civil rights under 42 U.S.C. §§ 1985(3) and 1986 (2000) and are also liable under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680 (2000). Among other relief, he sought money damages, costs, and attorneys' fees. He also petitioned for a writ of mandamus to "keep [Isidoro safe while in Colombia, assure access and unhindered communication with Isidoro, and to seek pursuant to

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[3]The defendants named in Rodriguez's original complaint include: the National Center for Missing and Exploited Children, Ernie Allen, Nancy Hammer, Guillermo Galarza, Proskauer Rose LLP, Warren L. Dennis, Susan Brinkerhoff, Miles & Stockbridge LLP, Stephen J. Cullen, Patrick H. Stiehm, Mary B. Marshall, Robert McCannell, Knute E. Malmborg, and John Does 1-20, in their individual capacity, the Office of Children Issues, the Office of Legal Advisor for Consular Affairs, U.S. Department of State, an unknown number of unnamed and unknown employees of the United States, in their official and individual capacities, the United States Department of State, and the United States of America. For simplicity, the named defendants are categorized herein as either "federal defendants" or "private defendants." Collectively, however, they are referred to as simply "defendants."

Isidoro's wishes and rights his immediate return to the United States." Compl. at p. 38. During the pendency of his case, Rodriguez filed an amended complaint, adding numerous additional defendants, including every court and the majority of judges who had ruled on his previous federal and state filings. He likewise moved to disqualify Judge Richard W. Roberts, the district judge assigned to his case, pursuant to 28 U.S.C. § 455 (2000).

The district court granted the defendants' motion to dismiss the original complaint under Federal Rule of Civil Procedure 12(b) for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. Rodriguez v. Nat'l Ctr. for Missing & Exploited Children. et. al., No. 03-120, slip op. at 13 (D.D.C. Mar. 31, 2005). First, as to Rodriguez's constitutional claim, the district court held that the federal defendants are immune from suit based upon the doctrine of sovereign immunity. Id. at 19-20. It also held that the private defendants are not proper defendants under the Constitution, citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Id. at 21-25.

Second, the district court found that the United States did not waive its sovereign immunity for Rodriguez's tort claim. Id. at 31. It also observed that of all of the torts he alleged, Rodriguez presented only a claim for intentional infliction of emotional distress ("IIED")at the agency level, a prerequisite for litigating a tort claim under the FTCA. Id. at 32. The district court thus limited its consideration of Rodriguez's tort claim to this one cause of action and held that he failed to allege any facts showing outrageous conduct on the part of the remaining defendants, an essential element of an IIED claim. Id. at 34-35.

Third, the district court held that Rodriguez's civil rights claims against the federal defendants are barred by the doctrine of sovereign immunity. Id. at 36. As to the private defendants, the district court held that Rodriguez did not allege facts sufficient to show that the private defendants conspired to violate either Rodriguez's or Isidoro's civil rights based on a discriminatory animus directed at U.S. Hispanic males. Id. at 37-39.

Finally, since the United States District Court for the Eastern District of Virginia had issued an order requiring that Isidoro return to Colombia, the district court found that Rodriguez failed to show a "clear and indisputable" right to a writ of mandamus. Id. at 39. It likewise concluded that both Rodriguez's motion to disqualify and his amended complaint were "nothing more than a transparent attempt at judge-shopping and forum-shopping." Id. at 42. Consequently, the district court denied both the petition for writ of mandamus and the motion to disqualify and struck Rodriguez's amended complaint.

Because the original complaint was dismissed under Rule 12(b), the district court entered final judgment, dismissing the entire action. On May 23, 2005, Rodriguez timely appealed.

II. DISCUSSION

The appellees argue that summary affirmance is appropriate because the district court correctly held that even accepting Rodriguez's well-plead allegations as true, they did not engage in a conspiracy to deprive Rodriguez and Isidoro of their constitutional or civil rights or to commit a tortious act against either of them. Rodriguez responds by asserting that summary affirmance must be denied because "the ongoing

deprivation of [Rodriguez's and Isidoro's rights to impartial access to both federal and Virginia courts to seek redress of the ongoing obstruction with Rodriguez's substantive parental rights" violates the constitution and federal statute. Resp. for Appellees at 9. As Rodriguez and Isidoro have had ample access to the courts, Rodriguez's argument is unresponsive to the motion for summary affirmance. On the merits, he appears to assert that he and his son are being wronged, rather than why the trial court's dismissal or any other ruling constitutes reversible error.

A.

We conclude that the district court correctly found that the United States, its agencies, and officials are immune from suit under the doctrine of sovereign immunity as to Rodriguez's constitutional, tort, and civil rights claims. See United States v. Testan, 424 U.S. 392, 399 (1976). Here, Congress did not waive the United States's sovereign immunity with respect to Rodriguez's constitutional claim. See Clark v. Library of Congress, 750 F.2d 89, 103 n.31, 104 (D.C. Cir. 1984). Nor did Congress waive the United States's sovereign immunity with respect to Rodriguez's tort claim, see FDIC v. Meyer, 510 U.S. 471, 477-78 (1994), or his statutory civil rights claims, see Hohri v. United States, 782 F.2d 227, 245 (D.C. Cir. 1986). Consequently, the district court properly dismissed all Rodriguez's claims against the federal defendants for lack of subject matter jurisdiction.

B.

As to the private defendants, we address each cause of action in turn, beginning with Rodriguez's allegation of a civil conspiracy to violate Rodriguez's and Isidoro's

constitutional rights. We agree with the district court that the private defendants cannot be liable for such a conspiracy because they were not acting under the color of law. See Browning v. Clinton, 292 F.3d 235, 250 (D.C. Cir. 2002) ("Critical to a successful Bivens claim, of course, [the defendants] must have acted 'under color of [federal] authority.'" (quoting Bivens, 403 U.S. 388, 389 (1971) (alteration in original))). Rather, the private defendants acted as private entities. Indeed, Rodriguez's complaint, as the district court noted, does not even allege that any of the private defendants acted under color of law. As such, Rodriguez's constitutional claim against the private defendants was correctly dismissed by the district court for lack of subject matter jurisdiction.

With respect to Rodriguez's tort claim, he particularly alleges that the private defendants violated Isidoro's and his rights to the "society and companionship in the father/son relationship, access to the courts of the Commonwealth of Virginia, constitute an illegal shanghaiing of Isidoro from the United States, negligent supervision, intentional infliction of emotional distress, violation of freedom to petition the government, falsification of official documents, and an invasion of privacy." Compl. ¶141. Of these claims, the district court correctly noted that Rodriguez, pursuant to 28 U.S.C. § 2675(a) (2000), only presented his claim for intentional infliction of emotional distress to the United States Department of State, the appropriate administrative agency. See Compl. ¶ 142. His claim was denied in 2002, thus allowing the present tort claim. The district court also correctly found that Rodriguez's original complaint was devoid of any factual allegations reflecting egregious conduct, let alone outrageous or atrocious conduct, on the part of the private defendants. See Brownino, 292 F.3d at 248 (The tort of intentional infliction of emotional

distress"requires conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.") (quotations and citations omitted). We thus conclude that the district court properly dismissed Rodriguez's tort claim for failure to state a claim.

Finally, we conclude that the district court properly dismissed Rodriguez's civil rights claims against the private defendants for failure to state a claim. To prove a conspiracy in violation of § 1985(3), a plaintiff must show, inter alia that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268 (1993) (citations and quotations omitted). Here, even under the most liberal interpretation of the original complaint, Rodriguez did not allege any facts, which if true, would show that the private defendants conspired against either Rodriguez or Isidoro because they are Hispanic males living in the United States. In his original complaint, Rodriguez merely alleges: "Defendants conspired against Plaintiffs . . . based on invidious discriminatory animus against Rodriguez and Isidoro as U.S. citizens Hispanic men." Compl. ¶ 145. This allegation is merely a bald assertion; it plainly fails to connect the private defendants' alleged actions against Rodriguez and Isidoro with the latters' status as U.S. Hispanic males. Moreover, since a colorable claim under § 1985 is a prerequisite to a claim under § 1986, Mollnow v. Carlton, 716 F.2d 627, 632 (9th Cir. 1983), the district court properly dismissed Rodriguez's derivative § 1986 claim.

C.

The district court correctly denied Rodriguez's petition for a writ of mandamus. Pursuant to the Mandamus Act, 28 U.S.C. § 1361 (2000), a district court may grant mandamus relief if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." Power v. Barnhart, 292 F.3d 781, 784 (D.C. Cir. 2002) (quoting N. States Power Co. v. Dep't. of Energy, 128 F.3d 754, 758 (D.C. Cir. 1997)). Rodriguez cannot show a clear right to relief under any of the facts alleged in his complaint or reasonable inferences to be drawn therefrom. See Kerr v. U.S. Dist. Court for N. Dist. of Cal., 426 U.S. 394, 402 (1976) (citations and quotations omitted). On the contrary, as the district court noted, Isidoro presently resides in Colombia with his mother as a result of the order of the Eastern District of Virginia. See Hazbun Escaf v. Rodriguez, 200 F. Supp. 2d 603 (E.D. Va. 2002), affirmed, Hazbun Escaf v. Rodriguez, 52 Fed. Appx. 207 (4th Cir. 2002). Rodriguez and Isidoro have had the opportunity to fully adjudicate the merits of their child custody dispute in court; they simply are dissatisfied and disagree with the result. Accordingly, the district court was correct in holding that Rodriguez could not show a clear and indisputable right to a writ of mandamus.

D.

The district court did not abuse its discretion when it denied Rodriguez's motion to disqualify the district judge or when it struck his amended complaint. As the district court noted, Rodriguez's amended complaint mirrored his original complaint with the addition only of new governmental defendants, including the United States

District Court for the District of Columbia and Judge Roberts, and new conspiracy-based causes of action. Notably, Rodriguez made his filings after the defendants filed a motion to dismiss the original complaint and after Judge Roberts declined to recuse himself from the case. In light of the chronology of events, we can only infer that Rodriguez sought to delay any decision on the defendants' motion to dismiss. We thus agree with the district court that Rodriguez's motion and his amended complaint reflect an improper attempt to forum-shop and judge-shop.

III. CONCLUSION

Accordingly, for the reasons set forth herein, the district court's judgment of dismissal is summarily affirmed.

United States Court of Appeals 0f for the District of Columbia Circuit

No-05-5130

Dated: August 1, 2005

In re Isidoro Rodriguez, Esq., and as Father and next of friend of his 16 year old son Isidoro Rodriguez-Hazbun, and Isidoro Rodriguez-Hazbun,

Petitioners

05-5202

Isidoro Rodriguez, Esq., Father Isidoro Rodriguez-Hazbun, a minor and Isidoro Rodriguez-Hazbun,

Appellants

v.

National Center for Missing & Exploited Children, et al.,

Appellees

ORDER

It is ORDERED, on the court's own motion, that the above cases be consolidated.

For the Court
Mark J. Lagger, Clerk
By s/_____
Linda Jones
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ISIDORO RODRIGUEZ, *et al.*,	:
	:
Plaintiffs,	: Civil Action
	: No 03-CV-00120
v.	: (RWR)
	:
THE NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, *et al.*,	:
	:
Defendants.	:
	:

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' motion to dismiss [63, 65] be, and hereby are, GRANTED. The complaint is DISMISSED. It is further

ORDERED that the plaintiffs' motion for writ of mandamus [47] be, and hereby is, DENIED. It is further

ORDERED that plaintiffs' motions to disqualify [128, 132] ve, and hereby are, DENIED, and the amended complaint is STRICKEN., It is further

ORDERED that all remaining motions [120, 121, 130, 133] be and hereby are, DENIED as moot.

This is a final, appealable order

SIGNED this 21st day of March, 2005.

/s/

RICHARD ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISIDORO RODRIGUEZ, *et al.*,	:
	:
Plaintiffs,	: Civil Action
	: No 03-CV-00120
v.	: (RWR)
	:
THE NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, *et al.*,	:
	:
Defendants.	:
	:

MEMORANDUM OPINION

Isidoro Rodriguez ("Rodriguez") brought this lawsuit on behalf of himself and his minor son, Isidoro Rodriguez-Hazbun ("Isidoro") against a number of individuals, organizations, and agencies, alleging that these defendants conspired to deprive him of his constitutional rights and committed violations of the Federal Tort Claims Act. Plaintiffs also petition for a writ of mandamus directing the Department of State to keep Isidoro safe in Colombia, assure Rodriguez access to Isidoro, and seek Isidoro's return to the United States. The federal defendants have moved for dismissal of the complaint under Rules 12 (b) (1), (2), (4), (5), and (6) of the Federal Rules of Civil Procedure, alleging lack of subject matter and personal jurisdiction, insufficient process and service, and failure to state a claim, respectively. The private defendants have moved for dismissal pursuant to Rules 12 (b) (1) and 12 (b) (6).

In Counts One and Two, plaintiffs allege constitutional violations under the First, Fifth, and Ninth Amendments. Because plaintiffs have failed to serve process on the federal individual defendants in their individual capacities, and because these individuals are entitled to sovereign immunity from suits for money damages against them in their official capacities, the constitutional claims against these individuals will be dismissed. Because the federal organizations have sovereign immunity from suits for money damages, the constitutional claims will also be dismissed as to these defendants. Because the private organizations and some of the private individuals are not proper defendants under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the constitutional claims will be dismissed as to them. For the remaining individual private defendants, the constitutional claims will be dismissed as to them because, even if they are proper Bivens defendants, plaintiffs have not stated a claim against those defendants that would withstand qualified immunity.

In Count Three, plaintiffs allege a number of violations of the Federal Tort Claims Act. Because the United States has not waived sovereign immunity with respect to constitutional torts, because plaintiffs failed to present certain of their alleged non-constitutional tort violations at the agency level, and because, with regard to the alleged tort violation they did present at the agency level, they fail to state a claim upon which relief can be granted, plaintiffs' claims under the Federal Tort Claims Act must be dismissed.

In Count Four, plaintiffs allege, pursuant to 42 U.S.C. §§ 1985(3) and 1986, the existence of a conspiracy to violate their constitutional rights. Because plaintiffs fail

to sufficiently state a claim that any alleged conspiracy was based on racial or other class-based animus, plaintiffs' claims under these statutes will be dismissed.

Because plaintiffs have failed to show that their right to a writ of mandamus, which they seek in Count Five and in a separately filed motion, is clear and indisputable, the request to issue a writ of mandamus will be denied.

Finally, plaintiffs filed a motion to disqualify me, pursuant to 28 U.S.C. § 455 (b) (5) (I) , along with an amended complaint adding me, among others, as a defendant. Because plaintiffs' motion and amended complaint are merely a transparent attempt at judge-shopping and forum-shopping, the motion to disqualify will be denied and the amended complaint will be stricken in its entirety.

BACKGROUND

I. PLAINTIFFS AND PREVIOUS LAWSUITS

According to the facts alleged in the complaint, Rodriguez is an attorney admitted to the bar in Virginia who traveled to and resided in Colombia between 1987 and 1999. (Compl. at 28, 30.) He fathered a child, Isidoro, in 1989. (Compl. at 31.) Rodriguez subsequently returned to live in the United States in 1999. (Compl. at 34.) Isidoro and his mother, Amalin Hazbun Escaf ("Hazbun"), remained in Colombia. After Rodriguez moved to Virginia, Hazbun and Rodriguez agreed to have Isidoro visit his father in the United States on several occasions. Hazbun Escaf v. Rodriguez, 200 F. Supp. 2d 603, 607 (E.D. Va. 2002), aff'd, Escaf v. Rodriguez, No. 02-487, 52 Fed. Appx. 207, 2002 WL 31760202 (4th Cir. Dec. 11, 2002), cert. denied, 538 U.S. 1000 (2003). Rodriguez claims that he had a right of

"visitation and right of access to Isidoro" based on a verbal divided custody agreement and written joint custody agreement he entered with Hazbun. (Pl.'s Omnibus Resp. at 4.)

Isidoro's third trip to visit Rodriguez in Virginia occurred during the months of June and July, 2001. Hazbun Escaf, 200 F. Supp. 2d at 607. On July 13, 2001, the day before Isidoro's scheduled return to Colombia, Rodriguez informed Hazbun that Isidoro would be remaining in the United States. Id. On the same day, Rodriguez filed a petition to modify the custody agreement between himself and Hazbun in the Juvenile and Domestic Relations Court of Fairfax County, Virginia. (Compl. Ex. 3a.) On August 15, 2001, Hazbun filed a Hague Convention Return Application with the Colombian Civil Authority, seeking Isidoro's return to Colombia under the Hague Convention on the Civil Aspects of International Child Abduction Act. Hazbun Escaf, 200 F. Supp. 2d at 607. Subsequently, on December 20, 2001, Hazbun filed a suit in the United States District Court for the Eastern District of Virginia seeking the return of Isidoro to Colombia under the Hague Convention, as implemented in the United States by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601-11610. See Hazbun Escaf, 200 F. Supp. 2d at 608. Rodriguez alleges that the defendants "conspired to file [the Hague Convention action], seeking and causing the expeditious shanghaiing of Isidoro against his wishes. . . from the United States to Colombia." (Compl. SI 38.)

On May 6, 2002, United States District Judge T.S. Ellis, III, of the Eastern District of Virginia issued a memorandum opinion holding that Rodriguez's retention of Isidoro in the United States violated Hazbun's custody rights, that Isidoro was not in grave risk of harm, that Isidoro's stated desire to

remain in the United States did not bar his return to Colombia, and that ICARA and the Hague Convention required Isidoro's return to Colombia. See Hazbun Escaf v. Rodriguez, 200 F. Supp. 2d 603 (E.D. Va. 2002). On December 11, 2002, the United States Court of Appeals for the Fourth Circuit affirmed the district court's ruling and also concluded that "the proceedings in district court did not violate either Rodriguez's or Isidoro's rights." Escaf v. Rodriguez, No. 02-487, 52 Fed. Appx. 207, 2002 WL 31760202 (4th Cir. Dec. 11, 2002), cert. denied, 538 U.S. 1000 (2003).

Rodriguez subsequently filed the instant action alleging that various defendants conspired to deprive him and his son of their constitutional rights. II. FEDERAL DEFENDANTS

With regard to the following federal defendants, plaintiffs allege that each "ha[s] and continues to engage in a custom, policy, or practice of disregarding and thereby violating the fundamental rights of United States citizens vis-a-vis their application and administration of the [Hague] Convention." (Compl. SIS! 58, 77, 103.) Plaintiffs also claim generally that "Defendants employees and agents intentionally conspired to deprive Rodriguez and Isidoro to their rights to equal protection and due process in whole or in part because of their being Hispanic." (Compl. SIS! 59, 78, 104.)

A. United States Department of State, The Office of Children's Issues, Bureau of Consular Affairs

Plaintiffs allege that defendants Office of Children's Issues, Bureau of Consular Affairs, and the U.S. Department of State are the entities responsible for the administration of the Hague Convention and ICARA. (Corapl. SI 46.) The only specific act he alleges that these entities engaged in was

"assist[ing] in the filing" of Hazbun's Convention action on December 20, 2001. (Compl. SI 74.)

B. Mary B. Marshall

Defendant Mary B. Marshall, whom plaintiffs sue in her individual and official capacities, is an employee and director of the Office of Children's Issues of the United States Department of State. (Compl. 23.) Plaintiffs appear to allege that Marshall "assisted in filing" Hazbun's Hague Convention action. (Compl. SI 74.) Plaintiffs also allege that Marshall sent letters to Fairfax Family Court on January 3, 2002 and to Judge Ellis on March 15, 2002. (Compl. SI 75.) They claim that these letters violated 42 U.S.C. §§ 11603-11604 "by negligently seeking to circumvent" Rodriguez's family court action and by concealing information regarding Colombia. (Id.) Finally, plaintiffs claim that Marshall acted negligently by improperly authorizing the alleged conspiracy, allowing interference in Rodriguez's family court action, failing to train and properly supervise employees, and failing to assure access and communication between Rodriguez and Isidoro. (See Compl. SI 123.)

C. Robert McCannell, Knute E. Malmborg, Office of Legal Adviser for Consular Affairs

Plaintiffs allege that Robert McCannell is the Executive Director of the Office of Legal Adviser for Consular Affairs. (Compl. SI 24.) Plaintiffs allege that Knute E. Malmborg is an attorney adviser at the Office of Legal Adviser for Consular Affairs. (Compl. 1 25.) Plaintiffs sue McCannell and Malmborg in their individual and official capacities. Plaintiffs also name the Office of Legal Adviser for Consular Affairs, of the U.S. Department of State, as a

defendant. (Compl. SI 21.) The only specific factual allegations made with regard to these defendants are that McCannell and Malmborg responded to Rodriguez's alleged FOIA request "only in response to express concerns" of the Fairfax Family Court, released to Rodriguez Hazbun's Hague Convention application only in Spanish, and "in violation of Rodriguez's right to petition the government,. . . refused to meet with Rodriguez." (Compl. SIS! 98-100, 102.) Rodriguez also asserts, apparently on the basis of the above alleged facts, that these defendants "conspired to conceal documents and provide falsely dated official documents." (Compl. SI 101.) Finally, plaintiffs claim that McCannell and Malmborg acted negligently by improperly authorizing the alleged conspiracy, allowing interference in Rodriguez's family court action, failing to train and properly supervise employees, and failing to assure access and communication between Rodriguez and Isidoro. (See Compl. SI 123.)

III. PRIVATE DEFENDANTS

With regard to the following private defendants, plaintiffs allege that each "ha[s] and continues to engage in a custom, policy, or practice [of disregarding] and thereby violating the fundamental rights of United States citizens vis-a-vis their application and administration of the [Hague] Convention." (Compl. SI 69; see Compl. SIS! 84, 96, 116.) Plaintiffs also claim generally that these defendants, or their employees and agents, "intentionally conspired to deprive Rodriguez and Isidoro to their rights to equal protection and due process in whole or in part because of their being Hispanic." (Compl. SIS! 70, 97, 117; see Compl. SI 85.)

A. National Center for Missing and Exploited Children, Guillermo Galarza, Nancy Hammer, Ernie Alien

The National Center for Missing and Exploited Children ("NCMEC") is a nonprofit corporation which plaintiff alleges acts as an instrumentality or agency of the United States. (Compl. SI 10.) Defendants Guillermo Galarza and Nancy Hammer are employees of the NCMEC. (Compl. 1 12, 13.) Plaintiffs allege that "[u]pon information and belief during the months of August and September 2001. . . Galarza, and other unnamed and unknown employees of Defendant NCMEC began conspiring to act as fiduciary and/or attorneys for Hazbun." (Compl. SI 64.) Specifically, plaintiffs appear to claim that Galarza, on or about August 6, 2001, left a telephone message with Hazbun and Isidoro regarding Hazbun seeking the return of Isidoro to Colombia. (Compl. *1* 61.) Additionally, Galarza and other unknown employees of NCMEC sent e-mails and telefaxes "advising and exerting influence on the Colombian Central Authority to quickly submit the Convention application" in an attempt to stop the suit in the Fairfax Family Court "and to restrict consideration under the more limited review of the Convention in the Federal Court. . .." (Compl. 1 65.)

Plaintiffs also appear to allege that the NCMEC took some unspecified action that resulted in Hazbun's application "falsely alleg[ing] that Rodriguez had retained Isidoro against his will, and failed to advise of the dangers of the 'zone of war' throughout Colombia" and that the NCMEC, Malmborg and McConnell falsified a document, apparently a supplement to Hazbun's Convention application. (See Compl. 66, 68.) Plaintiffs also claim that these defendants rejected Rodriguez's request to meet with them. (Compl. SI 67.) Finally, plaintiffs contend that NCMEC employees and unnamed individuals "talked with and sat behind Hazbun[] expressing obvious support to the Court of her action. . .." (Compl. SI 107.)

Plaintiffs name Ernie Alien, President and Chief Executive Officer of the NCMEC, as a defendant, but do not

allege any specific facts with regard to him. (See Compl. SI 11.) Plaintiffs only state that Alien, along with Hammer and Galarza, acted negligently by improperly authorizing the alleged conspiracy, allowing interference in Rodriguez's family court action, failing to train and properly supervise employees, and failing to assure access and communication between Rodriguez and Isidoro. (See Compl. SI 123.)

B. Patrick H. Stiehm

Defendant Patrick Stiehm is an attorney who provides volunteer legal services for the NCMEC. (Compl. SI 19.) Plaintiff specifically alleges that Stiehm made statements in open court at a Fairfax Family Court status hearing that he was there on behalf of NCMEC and would be filing a complaint in federal court to enforce the Hague Convention. (Compl. SI 80.) Plaintiffs also claim that Stiehm filed the federal district court action to enforce the Convention "as part of a conspiracy with NCMEC to develop a legal strategy based on sophistry and to use every ^gaming' and sharp attorney practice to block and assume away the arguments presented regarding Isidoro and Rodriguez's fundamental rights. . . as well as to prevent information being placed into the court record regarding the dangerous situation in Colombia for U.S. citizens." (Compl. SI 83.) Finally, plaintiffs claim that Stiehm "filed various motions with both the Fourth Circuit and the District Court, to seek the immediate arrest of Isidoro by law enforcement. . .." (Compl. SI 110.)

C. Proskauer Rose, LLP; Warren L. Dennis; Susan Brinkerhoff

These defendants are outside legal counsel for the NCMEC. (Compl. SI 86.) Plaintiffs generally assert that these defendants "intentionally conspired to develop a legal strategy. . . to block and prevent information" from being placed on the

court record regarding the dangerous situation in Colombia, and conspired with the NCMEC to avoid his family court suit. (Comp. 87, 92) . They appear to claim that specific acts that are evidence of the conspiracy are that Dennis and Proskauer Rose wrote a letter to Rodriguez making "false, defamatory, and libelous statements" regarding Rodriguez's attempts to meet with various other defendants; that Dennis wrote a letter to Rodriguez that did not address a notice Rodriguez sent to NCMEC regarding the alleged violations of his constitutional rights and his request for a meeting; that Dennis, Brinkerhoff, and Proskauer Rose referred to Rodriguez's family court action, in some unspecified forum or document, as "Bad was petitioning for custody of the minor child,' so to obfuscate consideration" of plaintiffs' fundamental rights; and that they in some manner "assisted Defendant Stiehm in the conspiracy to file" the action in federal district court. (Compl. *11 88,* 90, 93, 94.)

D. Miles & Stockbridge, Stephen John Cullen

Plaintiffs allege that defendant Miles & Stockbridge, LLP is a law partnership, that defendant Stephen Cullen is an attorney with Miles & Stockbridge, and that each provides volunteer legal services for the NCMEC. (Compl. 1! 17-18.) Plaintiffs claim that "throughout the Federal Convention Action, in furtherance of the conspiracy to apply the legal sophistry that the Convention effectively amend the fundamental rights of Rodriguez and Isidoro under the Constitution, Defendants. . . intentionally conspired with Defendant NCMEC." (Compl. SI 106.) Specifically, plaintiffs allege that these defendants entered a *pro hac vice* appearance on behalf of Hazbun on April 10, 2002, that Cullen made a statement in open court regarding plaintiffs' fundamental rights, that Cullen received a volunteer of the year award from the NCMEC, and that these defendants filed various motions with the Fourth

Circuit and the district court. (Compl. 11 105, 108, 109, 110.)

DISCUSSION

Before a court may address the merits of a complaint, it must assure that it has jurisdiction to entertain the claims. See Scott v. England, 264 F. Supp. 2d 5, 8 (D.D.C. 2002) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998)). Under Federal Rule of Civil Procedure 12 (b) (1), a defendant may move to dismiss a claim based on the court's lack of jurisdiction over the subject matter, and the plaintiff bears the burden of establishing that the court has subject matter jurisdiction. See Forrester v. United States Parole Comm'n, 310 F. Supp. 2d 162, 167 (D.D.C. 2004); see also McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (noting that the plaintiff "must carry throughout the litigation the burden of showing that he is properly in the court"). Because subject matter jurisdiction focuses on the court's authority to hear the claim, a court must "conduct a careful inquiry and make a conclusive determination whether it has subject matter jurisdiction or not," 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure: Civil 2d § 1350 (1990), by examining the complaint and, "where necessary, . . . [by] consider[ing] the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Coalition for Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003) (internal quotation omitted). If a defendant facially challenges the basis for subject matter jurisdiction, the plaintiffs' factual allegations are assumed to be true, though a defendant's challenge to the jurisdictional facts requires a resolution of those disputed facts. See Wright & Miller, supra, § 1350; see also Artis v. Greenspan, 223 F. Supp. 2d 149, 154 (D.D.C. 2002). If the jurisdictional ground pled in the complaint is "insufficient or entirely lacking but there are facts

pleaded in the complaint from which jurisdiction may be inferred, then the [Rule 12 (b) (1)] motion must be denied.'" Minebea Co., Ltd, v. Papst, 13 F. Supp. 2d 35, 38 n.2 (D.D.C. 1998) (quoting Wright & Miller, supra § 1350) .

A motion to dismiss for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6) should be granted only where it appears that there is no set of facts in support of the claims which would entitle a plaintiff to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "To that end, the complaint is construed liberally in the plaintiff's favor, and . . . plaintiff[] [receives] the benefit of all inferences that can be derived from the facts alleged." Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) . "However, the court need not accept inferences drawn by plaintiff if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Id. Thus, if plaintiff fails to allege sufficient facts to support a claim, that claim must be dismissed.

I. CONSTITUTIONAL CLAIMS

In Counts One and Two, Rodriguez charges that each of the defendants conspired to deprive him and his son of their rights to due process, equal protection, and access to the courts, and their right to petition the government under the First, Fifth, and Ninth Amendments. The gravamen of the complaint is that the defendants took actions in furtherance of an alleged conspiracy which allegedly resulted in the frustration of his custody suit in Juvenile and Domestic Court in Virginia. Specifically, plaintiffs claim that "due to Defendants bad motive' and conspiracy," plaintiffs have been deprived of "the fundamental rights of both Rodriguez as Father, and Isidoro as a Son in their

respective society and companionship, and their rights as U.S. citizens to be safe and remain in the United States without government interference pursuant to the Constitution. . .." (Compl. SI 128.) Rodriguez asserts that he has stated a Bivens claim. (Compl. SI 2.) Under Bivens, the federal courts may recognize a cause of action for damages against an individual personally for unconstitutional conduct committed by the individual as a federal official acting under color of law. Bivens, 403 U.S. at 392-97. See Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001); Browning v. Clinton, 292 F.3d 235, 250 (D.C. Cir. 2002) .

The federal defendants have moved to dismiss these claims arguing, *inter alia,* that plaintiffs' claims against the individual federal defendants in their personal capacities must be dismissed for lack of service of process, and that claims against the federal organizations and individual defendants in their official capacities must be dismissed because there has been no waiver of sovereign immunity for such claims. (Mem. Supp. Fed. Def.'s Mot. to Dismiss at 14, 25.) The private defendants have moved to dismiss these claims, arguing, *inter alia,* that the complaint fails to state a claim because it asserts only conclusory allegations, unsupported by alleged facts, of a conspiracy to deprive plaintiffs of their constitutional rights, that none of the private defendants are proper Bivens defendants, and even if the individual defendants were proper Bivens defendants, they would be entitled to qualified immunity from such claims. (Private Def.'s Mot. at 16-18.)

A. Service of Process on Defendants Marshall, McCannell, and Malmborg

In a Bivens action against a federal official in his or her individual capacity, the defendant must be served

pursuant to rules that apply to individual defendants. See Simpkins v. District of Columbia Gov't, 108 F.3d 366, 369 (D.C. Cir. 1997); Delgado v. Fed. Bureau of Prisons, 727 F. Supp. 24, 26 (D.D.C. 1989); Lawrence v. Acree, 79 F.R.D. 669, 670 (D.D.C. 1978). It is a plaintiff s responsibility to establish personal jurisdiction, and the plaintiff must ensure that service is properly effectuated by remedying any known defect in service. See Reuber v. United States, 750 F.2d 1039, 1049, 1052 (D.C. Cir. 1984), abrogated on other grounds by Kauffman v. Anglo-American School of Sophia, 28 F.3d 1223 (D.C. Cir. 1994); Rochon v. Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987).

Defendants contend in their motion to dismiss that plaintiffs failed to personally serve process on Marshall, McCannell, and Malmborg. (Mem. Supp. Fed. Def.'s Mot. to Dismiss at 14.) Plaintiffs moved for a declaratory judgment as to service of process on these defendants, alleging that service was accomplished by delivery of a summons and complaint to an employee from the Department of State's Office of Legal Advisor. (See Docket Entry #26.) In ruling on plaintiff's motion, the court noted that plaintiff's belief during the first month of litigation that personal service on these three defendants was effective in their personal capacities was not wholly unwarranted, and that plaintiff had moved promptly to resolve the status of this service issue after the effectiveness of the service was challenged. The court's Order gave plaintiff 85 days from March 10, 2004 to serve process upon Marshall, McCannell, and Malmborg in their individual capacities. (See Docket Entry #116.) To date, plaintiff has not provided notice that these defendants have been served in their individual capacities. As such, the plaintiffs' Bivens claims against Marshall, McCannell, and Malmborg in their individual capacities will be dismissed.

B. Sovereign Immunity for Bivens Claims Against Federal

Organizations and Individuals in their Official Capacities

Plaintiffs, in Counts One and Two, also appear to be seeking recovery against the United States, the United States Department of State and its offices -- The Office of Children's Issues and The Office of Legal Adviser for Consular Affairs -- as well as the individual federal defendants -Marshall, McCannell, and Malmborg-in their official capacities.

Sovereign immunity bars all suits against the United States, including suits against federal officers in their official capacities, except when there has been a statutory waiver of such immunity. See United States v. Mitchell, 445 U.S. 535, 538 (1980) (explaining that the United States, as sovereign, is immune from suit except where it consents to be sued, and that a waiver of sovereign immunity cannot be implied but must be expressed with clear congressional intent); Kentucky v. Graham, 473 U.S. 159, 166 (1985) (an official-capacity suit is to be treated as a suit against the government entity itself). The United States has not waived its sovereign immunity with respect to constitutional tort claims. Clark v. Library of Congress, 750 F.2d 89, 103 n.31, 104 (D.C. Cir. 1984) (in suit against Library and Librarian of Congress for violation of First Amendment rights, court held that sovereign immunity barred suit for money damages against Library and Librarian acting in his official capacity); Laswell v. Brown, 683 F.2d 261, 268 (8th Cir. 1982)(holding that, as to constitutional tort claim, the United States and its agencies were not proper defendants because of sovereign immunity, and explaining that Bivens does not waive sovereign immunity for actions against the United States). Furthermore, even where sovereign immunity has been waived, Bivens has not been extended to permit suit against a federal agency. See FDIC v. Meyer, 510 U.S. 471, 484-86 (1994). "[T]he purpose of Bivens is to deter *the*

officer,' not the agency." Corr. Servs. Corp., 534 U.S. at 69 (quoting FDIC v. Meyer, 510 U.S. at 485) .

Accordingly, any Bivens claims asserted against the United States, federal agencies, and individual defendants in their official capacities are barred by the doctrine of sovereign immunity and will be dismissed pursuant to Federal Rule of Civil Procedure 12 (b) (1).

C. Private Entities Engaged in Alleged Constitutional Deprivation

The Supreme Court has held that there is no private right of action, pursuant to Bivens, for damages against private entities acting under color of federal law. See Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (in action alleging constitutional deprivation against private operator of halfway house, Supreme Court rejected the request to extend Bivens liability to new category of defendants); see also Kauffman v. Anglo-American School of Sofia, 28 F.3d 1223, 1224 (D.C. Cir. 1994)(holding that an entity that is not a federal agency, but that is constrained by the Constitution in some or all of its acts solely because of lesser links to the federal government, is equally exempt from Bivens liability); Meuse v. Pane, 322 F. Supp. 2d 36, 38-39 (D. Mass. 2004) (holding that plaintiff could not sustain a Bivens action against broadcast network because "a Bivens claim is simply not available against a private entity even if that entity is acting under the color of federal law").

Plaintiffs assert that NCMEC "is a nonprofit corporation operating in all the States acting as an instrumentality or agency of the United States." (Compl. 1 10.) Plaintiffs thus seem to be asserting inconsistently that the NCMEC is both a nonprofit corporation, which NCMEC claims to be, and a

government agency. Assuming that NCMEC is a nonprofit corporation, whether or not NCMEC was acting under the color of federal law, plaintiffs have no right of action for damages against it, and thus the constitutional claims for damages against NCMEC must be dismissed. Alternatively, construing the complaint to allege that the NCMEC is a government agency and accepting such a claim as true, the NCMEC has sovereign immunity from such claims as is explained above.

Plaintiffs also assert that defendants Proskauer Rose, LLP and Miles & Stockbridge, LLP are law partnerships, each of which provides legal counsel or legal service to NCMEC. (Compl. 11 14, 17.) As to these private entities as well, whether or not they were acting under the color of federal law, plaintiffs have no private right of action for damages for alleged constitutional violations.

D. Alleged Constitutional Violations by Alien, Hammer, Galarza, Stiehm, Dennis, Brinkerhoff, and Cullen

Several defendants argue that the Bivens claims against them should be dismissed because they are private actors not acting under the color of federal law, and thus are not proper Bivens defendants. (Private Def.'s Mot. to Dismiss at 32.) "Critical to a successful Bivens claim" is that defendants "must have acted `under color of [federal] authority.'" Browning v. Clinton, 292 F.3d 235, 250 (D.C. Cir. 2002)(quoting Bivens, 403 U.S. at 389). "To be `under color of authority,' the conduct must be' cloaked with official power [and the official must] purport to be acting under color of official right.'" Id. (quoting Lopez v. Vanderwater, 620 F.2d 1229, 1236 (7th Cir.1980)).

Proskauer Rose attorneys Warren Dennis and Susan Brinkerhoff, Miles & Stockbridge attorney Stephen Cullen, and

solo practitioner Patrick Stiehm, are private attorneys. Plaintiffs' complaint does not allege that any of these individuals or their firms are employees or officers of the United States, that they are government actors, or that they acted under the color of federal law. As such, they are not proper Bivens defendants. See Van Leeuwen v. United States, 868 F.2d 300, 301-02 (8th Cir. 1989)(affirming district court's ruling that plaintiffs did not state Bivens claim or § 1983 claim against certain defendants, because none was a government actor or in conspiracy with a government actor). Cf. Polk County v. Dodson, 454 U.S. 312, 318 (1981)(noting that "the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor `under color of state law' within the meaning of § 1983"); McCord v. Bailey, 636 F.2d 606, 613 (D.C. Cir. 1980) ("In their capacities as representatives of a client in court, private counsel do not act under color of state law.").[1]

Defendants Alien, Hammer, and Galarza are employees of the NCMEC, a nonprofit corporation. (See Compl. *11* 10-13.) The defendants argue that "[a]lthough the NCMEC carries out certain Hague Convention and ICARA functions on behalf of the State Department, the NCMEC is simply a private non-profit corporation that has contracted with the Depart

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[1]Although plaintiffs appear to allege that these private attorneys conspired with government actors, plaintiffs' conclusory allegations of a conspiracy, unsupported by the alleged facts, are insufficient to recognize a cause of action against these private individuals under Bivens. See Ostrer v.Aronwald, 567 F.2d 551, 553 (2d Cir. 1977); Meyer v. Reno, 911 F. Supp. 11, 15 (D.D.C. 1996)(dismissing plaintiff's claims for failure to state a claim upon which relief can be granted, as plaintiff failed to assert any factual basis to support the conclusion that a conspiracy existed)(citing Martin v. Malhoyt, 830 F.2d 237, 258 (D.C. Cir. 1987)).

ment of Justice and the State Department via a Cooperative Agreement to perform those functions." (Private Def.'s Mot. to Dismiss at 33).

Whether Alien, Hammer, and Galarza acted under color of federal authority need not be resolved, however, because even if they did, the claims of constitutional violations against these defendants do not withstand the defense of qualified immunity. Under Bivens, the federal courts may recognize a cause of action for damages for unconstitutional conduct committed by a federal official acting under color of law. 403 U.S. at 392-97. Government officials performing discretionary functions, however, generally have "qualified immunity" from civil damages liability unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[2] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity "focuses on the objective legal reasonableness" of the action as measured by legal rules that were "clearly established" at the

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[2]Supreme Court decisions have recognized two kinds of immunity defenses. "For officials whose special functions or constitutional status requires complete protection from suit, [the Supreme Court has] recognized the defense of `absolute immunity.'" Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). For example, absolute immunity applies to legislators in their legislative functions, judges in their judicial functions, and certain officials of the Executive Branch. Id. "For executive officials in general, however, . . . qualified immunity represents the norm. . .. [H]igh officials require greater protection than those with less complex discretionary responsibilities." Id. Furthermore, the Supreme Court has recognized that while judicial and legislative functions, for example, require absolute immunity, this protection extends only to acts legislative or judicial in nature, and not to other acts of judges and legislators, even when taken in their official capacities. Id. at 811.

time the action was taken. Id. at 819.

Whether an official has qualified immunity is resolved by a two-step inquiry. See Saucier v. Katz, 533 U.S. 194, 201 (2001); Maye v. Reno, 231 F. Supp. 2d 332, 336 (D.D.C. 2002). The threshold question is whether, "[t]aken in the light most favorable to the party asserting the injury,. . . the facts alleged show the officer's conduct violated a constitutional right[.]" Saucier, 533 U.S. at 201 (citing Siegert v. Gilley, 500 U.S. 226, 232 (1991)). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." Id. If a violation could be made out, the second inquiry is "whether the [constitutional] right was clearly established." Id.

In assuming the truth of the facts plaintiffs have alleged, construing the complaint liberally in the plaintiffs' favor, and giving the plaintiffs the benefit of all inferences that can be derived from the facts alleged, "the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint [or] accept legal conclusions cast in the form of factual allegations." Kowal, 16 F.3d at 1276. Furthermore, "complaints containing only `conclusory,' `vague,' or `general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed." Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977)(holding that plaintiffs' unsupported allegations did not suffice to state a claim of governmental conspiracy to deprive plaintiffs of their constitutional rights, explaining that the complaint failed to show a nexus between an alleged pattern of harassment and acts of defendants). "Diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." Id. Cf. Contemporary Mission, Inc. v. United States Postal Serv., 648 F.2d 97, 106-08 (2d Cir. 1981) (where plaintiff sued Postal Service and its officials for

interference with constitutional rights, court affirmed grant of summary judgment, without discovery, to defendants where plaintiff merely "colored its complaint with conclusory allegations of a wide-ranging conspiracy to deprive it of its constitutional right to due process and free exercise of religion" and when required to furnish affidavits demonstrating existence of genuine issue of material fact, "plaintiff responded by presenting immaterial factual inconsistencies and by reiterating its conclusory allegations of conspiracy").

Here, plaintiffs' complaint contains merely conclusory allegations that employees of the NCMEC were engaged in a conspiracy to deprive plaintiffs of their fundamental rights. For example, plaintiffs allege that these defendants "have and continue[] to engage in a custom, policy, or practice of a conspiracy to disregard and thereby violat[e] the fundamental rights of United States citizens," and that "in furtherance of its unlawful custom, policy or practice. . . Defendants employees and agents intentionally conspired to deprive [plaintiffs] to their rights. . .." (See Compl. 11 69, 70.) Plaintiffs make many other broad-brush allegations, including that defendants "surreptitiously through legal sophistry use[d] the Convention to supercede the fundamental rights" of plaintiffs, that "[i]t is presumptively unconstitutional and violative of due process and access to the courts by a broad conspiracy to use political clout with the federal courts and to systematically take official action design[ed] to frustrate Isidoro suit in the Fairfax Family Court. . .." (See Compl. SI 129) . However, plaintiffs allege no specific facts which would be evidence of the existence of any such alleged conspiracy, or upon which an inference that such a conspiracy existed could be drawn.

To the extent that plaintiffs do make specific fact allegations regarding Galarza, Hammer, and Alien, they merely claim that Galarza left a telephone message with

Hazbun regarding Isidoro, that Galarza sent e-mails and faxes to the Colombian Central Authority allegedly advising it to quickly submit Hazbun's Convention application, and that Hammer refused to meet with Rodriguez. They also claim that these defendants allowed interference in Rodriguez's family court action, failed to train and properly supervise employees regarding plaintiffs' rights, and failed to assure access and communication between Rodriguez and Isidoro. These alleged facts do not allege either a conspiracy to deprive plaintiffs of their rights or the deprivation of any constitutional right at all. Nor do the results of these alleged actions support an inference that they were undertaken as part of an actionable conspiracy. Plaintiffs were not deprived of due process, access to the courts, a right to petition the government, or a father/son relationship. Rodriguez was heard by both the U.S. District Court for the Eastern District of Virginia and the U.S. Court of Appeals for the Fourth Circuit. See Hazbun Escaf v. Rodriguez, 200 F. Supp. 603 (E.D. Va. 2002); Escaf v. Rodriguez, 52 Fed. Appx. 207, 2002 WL 31760202 (4th Cir. 2002)(unpublished), cert. denied, 538 U.S. 1000 (2003). Judqe Ellis and the Fourth Circuit fully considered plaintiffs' custody claims and decided them. The Fourth Circuit also decided that the district court proceedinqs did not violate Rodriguez's parental rights or Isidoro's due process rights. Escaf v. Rodriguez, 52 Fed. Appx. 207 at 209. To the extent that plaintiffs are seeking relitigation of those issues, their claims are barred by the doctrine of collateral estoppel. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327-33 (1979)(holdinq that petitioners were collaterally estopped from relitiqatinq question of whether proxy statement was false and misleadinq, because petitioners had "full and fair" opportunity to litiqate their claims in a prior action brouqht by the SEC); Otherson v. Dep't of Justice, 711 F.2d 267, 273 (D.C. Cir. 1983) (collateral estoppel, or issue preclusion, is established when an issue was actually litigated and submitted for judicial determination in

an earlier case, the issue was "actually and necessarily determined by a court of competent jurisdiction" in the first case, and preclusion in the second case does not cause any unfairness).

II. CLAIMS UNDER FEDERAL TORT CLAIMS ACT

Plaintiffs allege in Count Three that the acts of defendants Marshall, McCannell, Malmborq, Alien, Hammer, Galarza and other unknown individuals violated the Federal Tort Claims Act ("FTCA"), in that their actions violated plaintiffs' rights to the society and companionship of the father-son relationship and access to the courts, and constituted an "illegal shanghaiing of Isidoro from the United States," negligent supervision, intentional infliction of emotional distress, violation of freedom to petition the government, falsification of official documents, and invasion of privacy. (Compl. *n* 139-142.) The federal defendants contend that the FTCA claims against them should be dismissed for failure to exhaust administrative remedies and for failure to state a valid claim under the FTCA. (Mem. in Support of Fed. Def.'s Mot. to Dismiss at 27-29.) The private defendants contend that only the United States is a proper defendant to an FTCA claim, and that the claim is foreclosed in any event by failure to file an administrative complaint against these defendants. (Private Def.'s Mot. to Dismiss at 35-37.)

The federal government, its agencies, and federal officials when sued in their official capacities, are shielded from tort actions for damages unless sovereign immunity has been waived. United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Mitchell, 445 U.S. 535, 538 (1980). The FTCA provides for a limited waiver of sovereign immunity for common law torts when the government's employees act negligently within the scope of their employment.

However, the FTCA does not waive sovereign immunity with respect to constitutional torts. See FDIC v. Meyer, 510 U.S. 471, 477-78 (1994) ("the United States simply has not rendered itself liable under [28 U.S.C.] § 1346 (b) for constitutional tort claims"); Laswell v. Brown, 683 F.2d 261, 267-68 (8th Cir. 1982); Birnbaum v. United States, 588 F.2d 319, 327-28 (2d Cir. 1978); Zakiya v. United States, 267 F. Supp. 2d 47, 56 (D.D.C. 2003); Meyer v. Fed. Bureau of Prisons, 929 F. Supp. 10, 13-14 (D.D.C. 1996); Kline v. Republic of El Salvador, 603 F. Supp. 1313, 1317 (D.D.C. 1985). Thus, plaintiffs' constitutional claims for access to the courts, to petition the government, violation of their rights to society and companionship of the father-son relationship,[3] and any other of these charges which could be construed as constitutional torts, must be dismissed as there is no applicable waiver of sovereign immunity.

A prerequisite to filing a civil tort action under the FTCA is the requirement of presentment pursuant to 28 U.S.C. § 2675 (a) . A claimant must present his claim to the appropriate administrative agency, and the claim must be denied by the agency, before the claimant may institute an action for that claim under the FTCA. 28 U.S.C. § 2675 (a) ; see GAF Corp. v. United States, 818 F.2d 901, 917-18 (D.C. Cir. 1987). Section 2675 (a) requires a claimant to file with the agency: "(1) a written statement sufficiently describing the injury to

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[3]Plaintiffs claim a right to society and companionship in the father-son relationship under the Fifth Amendment. Plaintiffs' articulation of this right is vague at best. The private defendants' motion speculates that plaintiffs allege a fundamental Due Process Clause right of parents in the care and custody of their children. However, whether this right of companionship that plaintiffs claim is an established constitutional right need not be decided.

enable the agency to begin its own investigation, and (2) a sum-certain damages claim." GAF Corp., 818 F.2d at 919. This notice requirement enables the agency "to investigate and ascertain the strength of a claim" and "to determine whether settlement or negotiations to that end are desirable." Id. at 920.

Rodriguez filed an administrative claim for relief with the United States Department of State on January 7, 2002. (Corapl. SI 142; see Compl. Ex. 13, 22.) The complaint was denied on August 1, 2002.[4] (Complaint SI 142; Ex. 21.) (See Compl. Ex. 23.) Plaintiff's administrative claim, in the form of a letter to Marshall, complains of actions violating his and his son's "fundamental Constitutional rights" and specifically alleges the following injuries: 1) that a letter from Marshall to Judge Valentine (of the Virginia Juvenile Domestic Court) misstated facts regarding Rodriguez's family court action and was "designed to obfuscate" Rodriguez's and Isidoro's fundamental rights "to modify the custody agreement"; 2) that Patrick Stiehm entered an appearance on behalf of the NCMEC in Rodriguez's family court action and stated that he would be filing a complaint in U.S. District Court under the Hague Convention and would be seeking a dismissal of the family court action, also allegedly "designed [to] obfuscate" Isidoro's fundamental rights; and 3) that Rodriguez "could only obtain telephone contact" with the NCMEC staff and Ms. Espie of Marshall's staff. (Compl. Ex. 13.) Plaintiff s letter also states

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[4]After this denial, on September 15, 2002, plaintiff filed an amendment to his administrative complaint (see Compl. SI 142, Ex. 22), which was not considered by the Department of State as it was deemed untimely. (See Compl. Ex. 23.) Under the regulations to the FTCA, 28 C.F.R. § 14.2 ©), an administrative claim "may be amended by the claimant at any time prior to final agency action. . .."

that these acts "have caused emotional distress and apprehension of the possible forced return and detention of [Isidoro] in Colombia." (Compl. Ex. 13.) This administrative complaint fails to present to the administrative agency all of the putative tort claims plaintiffs currently raise before the Court in Count Three of their complaint. Rodriguez's administrative complaint does not, and cannot reasonably be construed to, raise claims of "illegal shanghaiing of Isidoro from the United States," negligent supervision, falsification of official documents, or invasion of privacy. Thus, these claims must be dismissed as plaintiffs have failed to comply with the requirement of 28 U.S.C. § 2675. See Kline, 603 F. Supp. at 1317 (because plaintiffs failed to comply with 28 U.S.C. § 2675(a), their suit was barred).

The only of plaintiffs' common law tort claims in Count Three arguably raised at the agency level is intentional infliction of emotional distress. Intentional infliction of emotional distress "requires conduct so "'outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'"" Browning v. Clinton, 292 F.3d 235, 248 (D.C. Cir. 2002)(quoting Bernstein v. Fernandez, 649 A.2d 1064, 1075 (D.C. 1991) (quoting Restatement (Second) of Torts § 46 cmt. d (1965))). However, none of the factual allegations in the complaint that arguably were presented to the agency -- which include misstating facts, entering an appearance in court, and declining to meet with Rodriguez -- is so outrageous in character or so extreme in degree as to go beyond all possible bounds of decency. Thus, appellant can prove no set of facts in support of the intentional infliction of emotional distress claim. See Browning, 292 F.3d at 241, 248 (holding that where plaintiff made intentional infliction of emotional distress claim, relying upon threats and statements made which included terms such

as "scurrilous" and "garbage," situation could have been disturbing to plaintiff but did not go beyond all possible bounds of decency or qualify as "utterly intolerable in a civilized community"); Roqala v. District of Columbia, 161 F.3d 44, 57-58 (D.C. Cir. 1998) (where plaintiff alleged emotional distress based on police officer's actions of threatening to arrest her, yelling at her, laughing at her, and detaining her for an unnecessarily length of time at a police station, the court found that the officer's "conduct did not approach the level of egregiousness necessary to sustain a claim for intentional infliction of emotional distress").[5]

III. CLAIM OF CONSPIRACY TO VIOLATE CIVIL RIGHTS UNDER 42 U.S.C. § 1985(3) AND ACTION FOR NEGLECT TO PREVENT UNDER § 1986

In Count Four, plaintiffs allege that "some or all of the [defendants and others" conspired to violate their constitutional rights based on a discriminatory animus towards United States Hispanic men, in violation of 42 U.S.C. §§ 1985(3) and 1986. Specifically, plaintiffs claim that "there was a Meeting of the Minds among [the defendants] regarding their desire to

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[5]Plaintiffs appear to concede that they are not raising any common law tort claims in Count Three. In their opposition to the defendants' motions to dismiss, plaintiffs state that the defendants "are confused -- the FTCA claim was [] based on . . . the negligent actions to violate the rights under the Treaty and ICARA of the right of Isidoro to have the Fairfax Family Court hear the Treaty claim" and that the defendants' actions were "designed to deprive Rodriguez and Isidoro of their fundamental rights -- so to prevent a determination that the Treaty was unconstitutional as to efforts to take Isidoro out of the United States." (Pl.'s Omnibus Resp. in Opp. to Def.'s Motions to Dismiss at 29-30.)

violate and deprive Rodriguez and Isidoro based on being Hispanic United States citizens of the equal privileges and immunities under fundamental constitutional civil rights in the society and companionship in the father/son relationship, access to the Courts, and for Isidoro to stay in the United States." (Compl. SI 144.) Plaintiffs incorporate by reference all other facts alleged in their complaint in support of their conspiracy claim. (See Compl. SI 143.)

Section 1985(3) prohibits conspiracies to deprive any person of the equal protection of the law. 42 U.S.C. § 1985(3). Plaintiffs' §§ 1985 (3) claim against the federal defendants must be dismissed because it is barred by the doctrine of sovereign immunity. See Hohri v. United States, 782 F.2d 227, 245 n. 43 (D.C. Cir. 1986) (holding that § 1985, by its terms, does not apply to actions against the United States), vacated on other grounds, 482 U.S. 64 (1987); Brug v. Nat'l Coalition for the Homeless, 45 F. Supp. 2d 33, 40 (D.D.C. 1999); Graves v. United States, 961 F. Supp. 314, 318 (D.D.C. 1997).

The private defendants argue for dismissal on the ground that plaintiffs failed to allege facts that would demonstrate that the defendants acted out of racial animus. Plaintiffs "suing under § 1985(3) must allege: (1) a conspiracy; (2) for the purpose of depriving any person or class of persons of the equal protection of the laws, or of privileges and immunities under the law; (3) motivated by some class-based, invidiously discriminatory animus; (4) whereby a person is either injured in his person or property, or is deprived of any right or privilege of a citizen of the United States." Bruq, 45 F. Supp. 2d at 40 (citing Graves, 961 F. Supp. at 320.) Moreover, "[t]o sufficiently state a cause of action the plaintiff must allege some facts that demonstrate that his race [or other class-based animus] was the reason for the defendant[s'] [actions]. [A]

failure to allege such facts render[s] [a] discrimination claim under. . . § 1985 incomplete." Jaffree v. Barber, 689 F.2d 640, 643 (7th Cir. 1982)(where plaintiff s amended petition seeking writ of mandamus alleged that defendant had not investigated plaintiff's charges because of his race, and the only facts underlying that claim were that "the plaintiff is ^ Brown"' and "that his charges have not been investigated," court affirmed dismissal of the claim on the basis that allegations were conclusory); see Beran v. United States, 759 F. Supp. 886, 893 (D.D.C. 1991)(dismissing plaintiff's § 1985 claim in light of fact that plaintiff presented no facts to indicate that alleged conspiracy was prompted by racial or class-based animus); Maye v. Reno, 231 F. Supp. 2d 332, 339 (D.D.C. 2002)(holding that plaintiff failed to allege the requisite elements of a claim under any section of § 1985, for, among other reasons, plaintiff "provided insufficient allegations that he was treated differently from other similarly situated individuals"); Thomas v. News World Communications, 681 F. Supp. 55, 69 (D.D.C. 1988) (where plaintiffs claimed that alleged torts were motivated by religious animus, court held that plaintiffs failed to allege with sufficient specificity that defendants were motivated by discriminatory animus; where plaintiffs did expressly allege that defendants were motivated by religious animus, they also alleged other, non-actionable motivation, and "fail[ed] to specify any evidence that would support any of these allegations"). Here, plaintiffs claim that defendants conspired against them "in whole or in part because of their being Hispanic," and that they neglected to prevent violations of plaintiffs' fundamental rights "based on invidious discriminatory animus against Rodriguez and Isidoro as U.S. citizens Hispanic men," but plaintiffs allege no facts, which if taken as true, would support such a claim.

Section 1986 provides a right of action for damages against a person who, "having knowledge that any of the

wrongs conspired to be done, and mentioned in section 1985 of this Title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed. . .." 42 U.S.C. § 1986. "The language of this provision establishes unambiguously that a colorable claim under § 1985 is a prerequisite to stating an adequate claim for neglect to prevent under § 1986." Thomas, 681 F. Supp. at 72 (citing Mollnow v. Carlton, 716 F.2d 627, 632 (9th Cir. 1983)); see Dowsey v. Wilkins, 467 F.2d 1022, 1026 (5th Cir. 1972). Here, since plaintiffs have failed to state a claim under § 1985, plaintiffs' claims under 42 U.S.C. § 1986 will be dismissed.

IV. WRIT OF MANDAMUS

Plaintiffs also request a writ of mandamus directing the U.S. Department of State to "keep [Isidoro] safe while in Colombia, assure access and unhindered communication with Isidoro, and to seek [Isidoro's]. . . immediate return to the United States." (Compl. at 38-39.)

A writ of mandamus is "an extraordinary remedy, to be reserved for extraordinary situations." Nat'l Ass'n of Criminal Defense Lawyers, Inc. v. United States Dep't of Justice, 182 F.3d 981, 986 (D.C. Cir. 1999). For a writ of mandamus to issue, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires." Kerr v. United States Dist. Court for Northern Dist. of California, 426 U.S. 394, 403 (1976). In addition, the party seeking the writ must satisfy "the burden of showing that [his] right to issuance of the writ is ^clear and indisputable.'" Id. (internal quotations omitted). Furthermore, "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." Id.

Here, plaintiffs cannot establish that their right to issuance of the writ is "clear and indisputable." Indeed, the writ of mandamus that plaintiffs seek in this district would circumvent the order issued by the court in the Eastern District of Virginia requiring that Isidoro return to Colombia. Plaintiffs have neither presented any authority supporting the power of a district court to aid petitioners in achieving such judicial manipulation, nor established that the judicial process he invoked in Virginia was unavailable to adjudicate his case. The writ will be denied.

V. MOTION TO DISQUALIFY AND AMENDED COMPLAINT

Plaintiff Rodriguez filed a motion to disqualify me from this matter and to appoint a judge outside of the District of Columbia and the Fourth Circuit. Rodriguez claims that since plaintiffs have filed an amended complaint naming me as a defendant, I am required to disqualify myself pursuant to 28 U.S.C. § 455 (b) (5) (I) .

Section 455 (b) (5) (I) states that a judge "shall. . . disqualify himself" when he "[i]s a party to the proceeding. . .." 28 U.S.C. § 455 (b) (5) (I) . However, courts have construed this section as not requiring automatic disqualification. Anderson v. Roszkowski, 681 F. Supp. 1284, 1289 (N.D. 111. 1988) (citations omitted), aff'd, 894 F.2d 1338 (7th Cir. 1990). See, e.g., Tapia-Ortiz v. Winter, 185 F.3d 8, 10 (2d Cir. 1999)(holding that where appellant indiscriminately named all then-current Second Circuit judges as defendants, under the "rule of necessity" the court was not disqualified from resolving the appeal, despite § 455(b)(5)(I)). For example, "courts have refused to disqualify themselves under Section 455 (b) (5) (I) unless there is a legitimate basis for suing the judge" in order to prevent plaintiffs from "judge-shopping." Anderson, 681 F. Supp.

at 1289 (citing In re Martin-Trigona, 573 F. Supp. 1237, 1243 (D. Conn. 1983)). As one commentator has explained:

> A judge who is named as a defendant in a plaintiff's amended complaint is not required to disqualify himself or herself under 28 U.S.C.A. § 455 (b) (5) (I) unless there is a legitimate basis for suing the judge. For a judge to be disqualified simply because the plaintiff has sued the judge would be to allow the plaintiff to manipulate the identity of the decision-maker and thus to engage in judge-shopping.

32 Am. Jur. 2d Federal Courts § 149. In Anderson, the plaintiffs filed an amended complaint naming the current judge sitting in the case as a defendant, and renewed a previously filed motion to disqualify all of the judges in the Seventh Circuit and to transfer the case to a judge out of the Seventh Circuit. 681 F. Supp. at 1287-88. The court held that it was not required to disqualify itself under Section 455(b)(5)(I), explaining:

> It is apparent to the Court that plaintiffs do not have a legitimate basis for suing me, my secretary, and my minute clerk. None of us were sued in plaintiffs' initial complaint; we were added as defendants only after I dismissed plaintiffs' Complaint. . .. To disqualify myself simply because plaintiffs have sued me would be to allow plaintiffs to manipulate the identity of the decision maker and to engage in "judge-shopping". ... If this Court were to disqualify itself. . . plaintiffs would sue the new district judge and so on and so on. The Court will not allow plaintiffs to impede the administration of justice by suing every district judge. . . until their case is transferred out of the Seventh Circuit.
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> Id. at 1289.

Plaintiffs here have filed an amended complaint naming me, the United States District Court for the District of Columbia, the United States Courts of Appeals for the District of Columbia and Fourth Circuits and some of their judges, the Supreme Court of the United States, the Chief Justice of the United States, as well as other judges, organizations, and individuals. Plaintiffs' amended complaint appears to mirror in substance the original complaint, with a few additional defendants and causes of action. As in Anderson, it is apparent that plaintiffs do not have a legitimate basis for suing me or these other newly-named defendants. Rather, plaintiffs' amended complaint and motion to disqualify are merely transparent attempts to judge-shop and forum-shop. This is all the more evident given plaintiffs' previous motion requesting my recusal in this case pursuant to 28 U.S.C. §§ 144 and 455 (a) (see Docket Entry #73), which was denied. (See Docket Entry #114.) Because the thrust of plaintiffs' amended complaint clearly appears to be an effort to forum-shop and judge-shop, it will be stricken it its entirety.

CONCLUSION

Plaintiffs cannot proceed with their claims of constitutional violations under Bivens as to any of the defendants. Plaintiffs failed to serve process on the federal individual defendants in their individual capacities, and these individuals are entitled to sovereign immunity from suits for money damages against them in their official capacities. Additionally, the federal organizations have sovereign immunity from suits for money damages. The court thus does not have subject matter jurisdiction over these claims. As to the private organizations and some of the private individuals, they are not proper Bivens defendants. As to the other individual private defendants, even if they are proper Bivens defendants, plaintiffs have not stated a claim against them that would withstand qualified immunity.

The court also lacks subject matter jurisdiction over the plaintiffs' claims of constitutional torts under the Federal Tort Claims Act, as the United States has not waived sovereign immunity with respect to constitutional torts. Additionally, plaintiffs failed to present certain of their alleged non-constitutional tort violations at the agency level, and, with regard to the alleged tort violation they did present at the agency level, they fail to state a claim upon which relief can be granted.

Plaintiffs have also failed to allege facts supporting the existence of a conspiracy based on racial or other class-based animus sufficient to state a claim under § 1985(3). As such, they have also failed to state a claim under § 1986. Furthermore, plaintiffs have failed to show that their right to a writ of mandamus is clear and indisputable.

Finally, plaintiffs' recent motion to disqualify and their amended complaint are nothing more than a transparent attempt at judge-shopping and forum-shopping.

Accordingly, plaintiffs' motion to disqualify will be denied, the amended complaint will be stricken in its entirety, and plaintiffs' original complaint will be dismissed pursuant to Rules 12 (b) (1) and 12 (b) (6). An Order accompanies this Memorandum Opinion.

SIGNED this 31st day of March, 2005.

/s/_____
RICHARD W. ROBERTS
United States District Judge

Fairfax County Juvenile and
Domestic Relations District Court

To: Judge Mann Case No(s): JJ347050-01-03

From: Clerk's Office

Date: Jan. 21, 2005 Case Name: Rodriguez-Hazbun, Isidoro

Isidoro Rodriguez (Father) is appealing the following:
o Visitation

_____/s/_____
Isidoro Rodriguez

Bond Information

Juvenile Cases Only
Other: This is not an appealable order.
Date: Jan. 21, 2002 _____/s/_____
Judge Thomas Mann

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 18th day of August, 2004.

ISIDORO RODRIGUEZ-HAZBUN

Appellant.

v. Record No. 041702
Court of Appeals No3247-03-4

AMALIN HAZBUN ESCAF

Appellee.

From the Court of Appeals of Virginia

Upon consideration of the record and pleadings filed herein, the Court is of opinion that Isidoro Rodriguez lacks standing in this matter because he has no authority to sue in his son's name. Accordingly, the petition for appeal filed in this case is dismissed.

A Copy
Teste:
/s/
Clerk

United States Court of Appeals for the District of Columbia
Circuit
No-03-5092

Dated: July 1, 2003

In re Master Isidoro Rodriguez-Hazbun, fourteen-year-old son of Isidoro Rodriguez, Esq., and Isidoro Rodriguez, Esq. Father of Isidoro Rodriguez-Hazbun, a minor,

Petitioners

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing en banc, it is

ORDERED that the petition be denied.

Per Curiam

For the Court
Mark J. Lagger, Clerk
By s/_____
Michael c. McGrail
Deputy Clerk

A-55

United States Court of Appeals for the District of Columbia Circuit
No-03-5092

Dated: May 28, 2003

In re Master Isidoro Rodriguez-Hazbun, fourteen-year-old son of Isidoro Rodriguez, Esq., and Isidoro Rodriguez, Esq. Father of Isidoro Rodriguez-Hazbun, a minor,

Petitioners

BEFORE: Ginsburg, Chief Judge, and Edwards and Randolph, Circuit Judges

ORDER

Upon consideration of the petition for a writ of mandamus, and the motion to expedite consideration of the petition, it is

ORDERED that the petition be denied. To the extent petitioner seeks a writ of mandamus to be issued by the district court, petitioner has not demonstrated a "clear and indisputable" right to relief and that "no other adequate means to attain the relief" exist. In re Sealed Case No. 98-3077, 151 F.3d 1059, 1062-63 & n. 4 (D.C. Cir. 1998)(citations omitted). In deed, to attain the relief he seeks from the district court to amend the docket to reflect pending civil action, petitioner may move the district court to amend the docket to reflect that such action was brought my petitioner both individually and on behalf of his minor son. To the extent petitioner seeks a writ of mandamus to be issued to the Department of State, it is well-settled that such request be brought before the district court in the first instance. See Telecommunication Research & Action Ctr. v. FCC,

750 F.2d 70, 77 (D.C. Cir. 1984). It is

FURTHER ORDERED that the motion to expedite be dismissed as moot.

Per Curiam
S/_____

Ref No. 23.833(CUSTODY AND VISIT REGULATION)
FIRST FAMILY COURT ROOM, BARRANQUILLA, COLOMBIA,
August 26, 1997

Mrs. Mabel Castro-Palacio-Defendant's Attorney in the process for custody and visit regulations initiated by Mrs. Amalin Hazbun, against Mr. Isidoro Rodriguez Cruz, in favor of minor Isidoro Rodriguez Hazbun, requests this Court to add the present document to the record of the hearing attended on August 1st, 1997, raised with basis on the conciliation that the parties arrived at, in order to determine clearly and expressly, that the custody of the above mentioned minor will be shared by the parents, since this was the basic point for the conciliation.

The Court, in order to resolve the petition of the Defendant's Attorney, refers to the statement of the Defendant, which was literally written down and is hereby transcribed in its relevant portion, so that this Court may take the corresponding decision. Mr. Rodriguez-Cruz states in the aforementioned document:

"[I propose Joint Custody of my son ISIDORO RODRIGUEZ HAZBUN in the following manner:] That his mother Mrs. Amalin Hazbun Escaf keep him under her personal care but that both parents share the right for the education, and the moral and intellectual up-bringing of our son. As for the visits, I propose to take my son Isidoro Rodriguez-Hazbun on Fridays every fortnight at school's exit hour, in order to spend the weekend together, and to take him back to his mother on Sunday at seven p.m. or on Monday if it is a holiday, with his home work done, and with his complete luggage. On weekdays, that is, form Monday to Friday, I commit myself to take my son ISIDORO to his additional lessons, then take him and stay with him until seven o'clock p.m., at weeks when he will spend the night over, this is to say, once a week. At weeks

when he will not spend the night, apart from taking him from the above mentioned additional lessons, I will take him to his soccer lessons once a week until seven p.m., meaning that week there will be two visiting days on working days."

From the foregoing transaction, it is clearly observed that the mother of the minor Isidoro, retains the child's custody, and therefore there is no need to make any clarification thereto.

It would be otherwise if Mrs. Amalin Emilia Hazbun-Escaf had not complied with the conciliation terms stated in the document alluded by Mrs. Mabel Castro, in which case strict compliance would be requested to the Court, and Mrs. Hazbun-Escaf penalized accordingly.

Notify and comply

s/_____

LUZ MYRIAM REYES CASAS, Judge

s/_____

Serra Newman, Certified Translator, Lic. Ministry of Justice, Bogota Colombia, March 25, 1988 (23/0701).

HEARING BEFORE FIRST FAMILY COURT OF BARRANQUILLA, COLOMBIA
PROCESS: CUSTODY AND PERSONAL CARES
PLAINTIFF: AMALIN HAZBUN ESCAF
DEFENDANT: ISIDORO RODRIGUEZ CRUZ
MINOR: 1

In Barranquilla, on August first (1st) of Nineteen Ninety Seven (1997), during public hearing at the First Family Court, the Honorable Judge declares open the hearing in this process of CUSTODY AND PERSONAL CARES of AMALIN HAZBUN ESCAF vs. ISIDORO RODRIGUEZ CRUZ, on behalf of minor ISIDORO RODRIGUEZ HAZBUN. It is confirmed that both parties are present and their attorneys. At this stage of the hearing the Honorable Judge advice the parties to present an agreement or conciliation formula.

Defendant Mr. ISIDORO RODRIGUEZ speaks and says:

I propose the Joint Custody of my son ISIDORO RODRIGUEZ HAZBUN in the following manner:

That the mother AMALIN EMILIA HAZBUN ESCAF have him her personal cares but both parents share the rights of correction, moral and intellectual education of our minor child.

Regarding visitations: I propose to pick up my son ISIDORO RODRIGUEZ HAZBUN every fifteen days at the end of school day on Friday for him to stay with me all that weekend, taking him back on Sunday at 7 pm to the house of his mother or on Monday if it is holiday, with his homework done and his complete luggage. During the week days, this is Monday through Friday, I will pick up my son ISIDORO to take him to classes with the additional teacher assigned, and will pick him up at the class and continue with him until 7 pm, this when in

that week it correspond to me his visitation spending the night with me, this is once a week. When there is no visitation spending night with me besides picking him up on the day of the above noted classes I will pick him up on the day he has football classes once a week until the same hour, that means that in that week there will be two visitation days on week days. I want to add that in the case that for any circumstances there is not football class or writing class with the teacher, he will be with me anyway two working days in the week and in the other week one working day and will spend the weekend with me.

Vacations will be shared as follows: The child will spend one year Carnivals with a parent and Holy Week with the other, mid year vacation since are longer jointly parents agree (.....) fifteen days with the mother. The end of year vacation this year the first fifteen days will be with the father permitting that if the minor is still with him for December 31st spend that date with his mother and go back with him to finish the vacation and this situation of the end of year vacation will alternate annually keeping always the spirit of sharing one of the two special dates of December 24 and 31st of each year. No discussion fathers' day he will spend it with his father and mothers' day with his mother. Regarding birthday of the child ISIDORO we will celebrate it jointly the parents with our son, making it clear that next celebration will be made by me.

Ms. AMALIN HAZBUN takes the word and states: I am totally in agreement with the formula offered by the defendant. The Honorable Judge takes the word to say. Since the parties have arrived to an agreement about the totality of the litigation, being such agreement in accordance with the law, it is approved and this process finished.

It is just confirmed that at the non-compliance with the agreed hereby it will be applied by express statement of num. 4

of art. 350 of the Minor Code the sanctions provided on article 72 ibidem.

No costs in this process. It is signed by all those who have intervened. The parties wish to clarify that just for year 1988 the mother will have the minor during Carnivals as well as Holy Week.

The Judge:
s/_____
LUZ MYRIAM REYES CASAS, Judge
Plaintiff:
s/_____
AMALIN HAZBUN ESCAF
Defendant:
s/_____
ISIDORO RODRIGUEZ CRUZ
Attorney for Plaintiff
s/_____
LUZ MYRIAM SANCHEZ DE CARVAJAL
Attorney for Defendant
s/_____
MABEL CASTRO PALACIO
The Court Clerk
s/_____
ELVIA MAZA DE CANTILLO
s/_____
Serra Newman, Certified Translator, Lic. Ministry of Justice, Bogota Colombia, March 25, 1988-23/07/01

U.S. CONSTITUTION, TREATY, FEDERAL STATUTES/ REGULATION AND CODE OF VIRGINIA, INVOLVED

The Supremacy Clause of the United States Constitution, article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fifth Amendment of the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

Ninth Amendment of the United States Constitution provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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18 U.S.C. § 4 - Misprision of felony.

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil . . . authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 1001 - Statements or entries generally.

(a) [W]hoever, in any matter within the jurisdiction of the executive, legislative, and judicial branch of the Government of the United States, knowingly and willfully: (1) falsifies, conceals, . . . a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; . . . shall be fined . . . or imprisoned not more than 5 years, or both.

18 U.S.C. § 1204 - International parental kidnapping.

(a) Whoever. . . retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.

(b) As used in this section -

(1) the term "child" means a person who has not attained the age of 16 years; and

(2) the term "parental rights", with respect to a child, means the right to physical custody of the child -
(A) whether joint or sole (and includes visiting rights); and,
(B) whether arising by operation of law, court order, or legally binding agreement of the parties.

---

28 U.S.C. § 3- Vacancy in office of Chief Justice; disability

Whenever the Chief Justice is unable to perform the duties of his office . . ., his powers and duties shall devolve upon

the associate justice next in precedence who is able to act, ...

28 U.S.C. § 291(a)-Circuit judges

(a) The Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon the request by the chief judge or circuit justice of such circuit.

28 U.S.C. § 292(d)-District judges

(d) The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

28 U.S.C. § 455-Disqualification of Justice, Judge . . . .

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .;

(5) He . . .

(I) Is a party to the proceeding, ... ;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Virginia Uniform Child Custody Jurisdiction and Enforcement Act

VA Code § 20-146.4. International application. —

A. A court of this Commonwealth shall treat a foreign country

as if it were a state of the United States for purposes of applying this article and Article 2 (§ 20-146.12 *et seq.*)

B. Except as otherwise provided in subsection C, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this act must be recognized and enforced under Article 3 (§ 20-146.22 *et seq.*) of this chapter.

C. A Court of this Commonwealth need not apply this act if the child custody law of a foreign country violates fundamental principles of human rights.

VA Code § 20-146.23. Enforcement under Hague Convention Under this article a court of this Commonwealth may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction.

VA Code § 20-146.25. Temporary visitation. —

A. A court of this Commonwealth that does not have jurisdiction to modify a child custody determination may issue a temporary order enforcing: 1. A visitation schedule made by a court of another state . . . .;

VA Code § 20-146.29. Expedited enforcement of child custody; determination. —C. Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

VA Code § 20-146.35. Appeals. — An appeal may be taken

from a final order in a proceeding under this article in accordance with expedited appellate procedures in other civil cases. . . .

The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501

Article 1

The object of the present Convention are-. . . . b) to ensure that rights . . . of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting State shall take all appropriate measures to secure within their territories the implementation of the object of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 5

For the purpose of this Convention-. . . . b)"right of access" shall include the right to take a child for a limited period of time to a place other then the child's habitual residence.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously for the return of children. . . .

Article 19

A decision under the Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Chapter IV–Right of Access, *Article 21*

An application to make arrangement for organizing or,

securing the effective exercise of the rights of access may be presented to the Central Authority of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights are subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Article 29

This Convention shall not preclude any person, . . . who claims there has been a breach of . . . access within the meaning of . . . Article 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

The International Child Abduction Remedies Act

42 U.S.C. § 11601

(a) Findings. The Congress makes the following findings: . . . .

(4) The Convention on the Civil Aspects of International Child Abduction, . . . establishes legal rights and procedures for the prompt . . . securing the exercise of visitation rights. . . .

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention. . . .

(4) The Convention and this chapter empower courts of the United States to determine under the Convention and not the merits of any underlying child custody claims.

42 U.S.C. § 11602. Definitions

For the purpose of this chapter-

(1) the term "applicant" means any person who, . . . , files an application . . . for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention.

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking the relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights.

42 U.S.C. § 11603

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction or actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention . . . for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed. . . .

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention .

(e) Burden of proof

(1) a petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence- . . . .

((B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

42 U.S.C. § 11605. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

Department of State, 51 Fed. Reg. 10,513 (1986), V. Access Rights-Article 21.

C. Procedure for Obtaining Relief

Procedurally Article 21 authorizes a person complaining of, or seeking to prevent a breach of access rights to apply to the CA of a Contracting State in the same way as a person seeking return of the child. . . .

Once the CA receives such application, it is to take all appropriate measures pursuant to Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights are subject. . . .

D. Alternative Remedies

In addition to or in lieu of invoking Article 21 to resolve visitation-related problems, under Article 18, 29 and 34 an aggrieved parent whose access rights have been violated may by pass the CA and the Convention and apply directly to the judicial authority of a Contracting State for relief under other applicable laws.

INTERNATIONAL ABDUCTION CONCURRENT RESOLUTION 293 --PASSED BY HOUSE WASHINGTON, D.C., May 23, 2000

House Concurrent Resolution 293, introduced by Congressman Nick Lampson (D, Tx-9), Founder and Chairman of the Congressional Missing and Exploited Children's Caucus, was passed 416-0 by the House on May 23rd, 2000. The concurrent resolution, which urges signatories of the Hague Convention on the Civil Aspects of International Child Abduction to uphold the agreement, was brought to the floor under suspension.

Resolution 293

Whereas the Department of State reports that at any given time there are 1,000 cases of American children either abducted from the United States or wrongfully retained in a foreign country;

Whereas many more cases of international child abductions are not reported to the Department of State;

Whereas the situation has worsened since 1993, when Congress estimated the number of American children abducted from the United States and wrongfully retained in foreign

countries to be more than 10,000;

Whereas Congress has recognized the gravity of international child abduction in enacting the International Parental Kidnapping Crime Act of 1993 (18 U.S.C. § 1204), and the Parental Kidnaping Prevention Act (28 U.S.C. § 1738a), and substantial reform and reporting requirements for the Department of State in the fiscal years 1998-1999 and 2000-2001 Foreign Relations Authorization Acts;

Whereas the United States became a contracting party in 1988 to the Hague Convention on the Civil Aspects of International Child Abduction (in this concurrent resolution referred to as the `Hague Convention') and adopted effective implementing legislation in the International Child Abduction Remedies Act (42 U.S.C. §§ 11601 *et seq.*);

Whereas the Hague Convention establishes mutual rights and duties between and among its contracting states to expedite the return of children to the state of their habitual residence, as well as to ensure the rights of custody and of access of the laws of one contracting state are effectively respected in the other contracting states, without consideration of the merits fo any underlying child custody dispute;

Whereas Article 13 of the Hague Convention provides a narrow exception to the requirement for prompt return of children, which exception releases the requested state from its obligation to return a child to the country of the child's habitual residence if it is established that there is a `grave risk' that the return would expose the child to `physical or psychological harm or otherwise place the child in an intolerable situation' or `if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of [the child's] views';

Whereas the National Center for Missing and Exploited Children (NCMEC), the only institution of its kind, was established in the United States for the purpose of assisting parents in recovering their missing children;

Whereas Article 21 of the Hague Convention provides that the central authorities of all parties of the convention are obligated to cooperate with each other in order to promote the peaceful enjoyment of parental access rights and fulfillment of any conditions to which the exercise of such rights may be subject, and to remove as far as possible, all obstacles to the exercise of such rights;

Whereas some contracting states fail to order or enforce normal visitation rights of parents of abducted or wrongfully retained children who have not been returned under the terms of the Hague Convention; an

Whereas the routine invocation of the Article 13 exception, denial of parental visitation of children, and the failure by several contracting parties most notably Austria, Germany, Honduras, Mexico, and Sweden, to fully implement the Convention deprives the Hague Convention of the spirit of mutual confidence upon which its success depends: Now, therefore, be it Resolved by the House of Representative (the Senate concurring), That Congress urges--

1) all contracting parties to the Hague Convention, particularly European civil law countries that consistently violate the Hague Convention such as Austria, Germany, and Sweden, to comply fully with
both the letter and spirit of their international legal obligations under the Convention;

2) all contracting parties to the Hague

Convention to ensure their compliance with the Hague Convention by enacting effective implementing legislation and educating their judicial and law enforcement authorities;

3) all contracting parties to the Hague Convention to honor their commitments and return abducted or wrongfully retained children to their place of habitual residence without reaching the merits of any underlying custody dispute and ensure parental access rights by removing obstacles to the exercise of such rights;

4) the Secretary of State to disseminate to all Federal and State courts the Department of State's annual report to Congress on the Hague Convention compliance and related matters; and

5) each contracting party to the Hague Convention to further educate its central authority and law enforcement authorities regarding the Hague Convention, the severity of the problem of international abduction, and the need for immediate action when a parent of an abducted child seeks their assistance.

U.S. Senate Judiciary Committee Confirmation Proceedings of Nominee Justice John G. Roberts to position of Chief Justice of the United States Supreme Court, August 1, 2005.

Question 20, Party to Civil Legal or Administrative Proceeding:

State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil, legal or administrative proceeding, If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest.

Response: I am a named party in Rodriguez, et al. v.

Nat'l Ctr. For Missing & Exploited Children, et al., 03-cv-00120 (D.D.C. filed Jan. 27, 2003) *appeal docketed*, No. 055202 (D.C. Cir. May 23, 2005). I was added as a named defendant–along with eight other judges on the D.C. Circuit, Chief Justice Rehnquist, and several judges form other circuits–in plaintiff's First Amended Complain, filed on March 8, 2005. On March 31, 2005, the District Court of the District of Columbia dismissed the action with regard to the defendants in the original complaint, and ordered the amended complaint stricken. A notice of appeal was filed by Mr. Rodriguez on May 23, 2005. According to published judicial opinions in the matter, Mr. Rodriguez is a Virginia resident with ties to Colombia. He lived in Colombia for mush of the period between 1987 and 1999 and there fathered a child, Isidoro, in 1989. In 2001, Isidoro and his mother visited Mr. Rodriguez in Virginia. Hear the end of the visit, Mr. Rodriguez would not allow Isidoro to return to Colombia and filed a petition to modify custody in Fairfax County, Virginia court. Isidoro's mother answered with a suit in federal district court for the Eastern District of Virginia under the Hague Convention on the Civil Aspects of International Child Abduction; she won, and won again on appeal. Mr. Rodriguez now alleges a conspiracy on the part of numerous federal and private defendants to deprive him of his constitutional rights.

No. 05-1059

IN THE
SUPREME COURT OF THE UNITED STATES

ISIDORO RODRIGUEZ, AND ISIDORO RODRIGUEZ-HAZBUN,

Petitioners,

vs.

THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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SUPPLEMENTAL BRIEF

Isidoro Rodriguez, Esq.
Counsel for Petitioners
THE LAW OFFICES OF ISIDORO RODRIGUEZ
2304 Farrington Avenue
Alexandria, Virginia 22303-1520
(703)317-0526; E-mail: isidororr@earthlink.net

PETITION FOR CERTIORARI FILED FEBRUARY 20, 2006

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TABLE OF CITED AUTHORITIES

DISCUSSION

Petitioners Isidoro Rodriguez ("Rodriguez-Father"), and Isidoro Rodriguez-Hazbun (Isidoro-Son), pursuant to S. Ct. Rule 15.8, files this supplemental brief in support of their pending petition for writ of certiorari.

Rodriguez-father and Isidoro-Son, brings to the Court's attention the decision issued this past Tuesday by the United States Court of Appeals for the Fourth Circuit in, *Sarah Claudia Aragon Canter vs. Andrew Cohen*, 4th Cir. No. 05-1609, March 21, 2006, regarding the limited jurisdiction of the federal courts and the mandate of securing visitation pursuant to the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C.A. §§ 11601-11611 (West 2005), and the Hague Convention on the Civil Aspects of International Child Abduction ("Treaty"), Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501.

In *Canter*, a citizen of Israel filed an action in the federal court in Maryland seeking the enforcement of custody and visitation rights. The District Court dismissed the visitation claim for lack of jurisdiction. The Fourth Circuit affirmed, holding that the federal courts are of limited jurisdiction (A-12)[reference to the page of the 4th Cir. decision in the Appendix], and neither had jurisdiction under the Treaty or ICARA, to effect the merits of parental rights [*see also* discussion by dissent at (A-24)], nor did the federal courts have jurisdiction to consider a petition by one parent to secure visitation rights against another.

Directly on point to the issue before this Court, the Fourth Circuit held that to securing of visitation rights was the responsibility of the Central Authorities under the

Treaty. The Fourth Circuit stated,

> We note that our decision does not leave the Appellant without a remedy for the exercise of her access rights. The Convention does not prevent the Appellant from filing a claim for visitation in state court under the state's visitation law [citation omitted. Additionally, as discussed above, the Appellant may file a petition with the [Department of State and the National Center for Missing & Exploited Children ("Executive Branch")] pursuant to the Convention in order to address her access claims. (Emphasis added)(A-23)

As the record shows this was exactly what Isidoro-Son and Rodriguez-Father have sought to do since January 27, 2003:

first, by seeking the issuance of a writ of mandamus to the Executive Branch to compel their compliance with their ministerial duty under Article 2, 11, 19, 20, 21, and 29 of the Treaty, 42 U.S.C. § 11601(a) & § 11602(1) and (7) of ICARA; as well as the Congress's Joint Concurrent Resolution 293 of May 23, 2000; and,

second, pursuant to VA Code § 20-146.25, .29, and .35 of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), as well as the Treaty and ICARA, by filing petitions with the Virginia Courts to secure visitations.

However, in response the Executive Branch, as well as both the Federal and Virginia Courts, for the past three years have denied that the mandates of Congress

and the General Assembly of Virginia to secure visitation existed. For example;

o Respondent-Defendants Stephen John Cullen and Miles & Stockbridge who argued in *Canter* that the federal courts were to secure visitation, are the same Defendants in this action who for three years have argued to both the federal courts and the Virginia Court that the right to secure visitation does not exist;

o Judge Richard Roberts held that the NCMEC was only a non-profit, and not the independent contractor "instrumentality of government," responsible to secure visitation. *But See Cantor*, [the Fourth Circuit noted this relationship of the Executive Branch (A-9)].

o Judge Richard Roberts and the Virginia Courts stripping that Rodriguez-Father of his rights based on Judge T.S. Ellis III ordering Isidoro-Son returned to the Republic of Colombia.

On this latter point, relevant to Rodriguez-Father and Isidoro-Son efforts for the past three years to secure visitation subsequent to Judge Ellis III order, the Fourth Circuit confirmed that it was the District Court duty to "craft a remedy **within the context of the Convention**" to ensure the exercising of visitation rights. (emphasis in the order)(A-20).

Thus Isidoro-Son and Rodriguez-Father have been repeatedly deprived for over three years of their rights to visitation in violation of 18 U.S.C. §§ 4, 371, 1001, and 1204, these governmental entities, employees, agents, attorneys, have obstructed with Rodriguez-Father's parental rights.

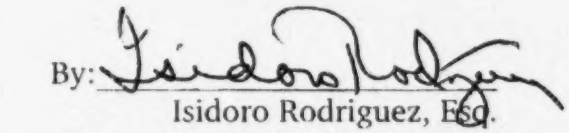
CONCLUSION AND RELIEF SOUGHT

Based on the analysis in *Canter*, it is clear that since his being shanghaied to Colombia on June 11, 2002,for over three years Rodriguez-father and Isidoro-son have been illegally denied their right to visitation under a Joint Custody Settlement Agreement entered in August 1997, in violation of the Treaty, ICARA, and VA Code. Furthermore, based on the analysis in *Canter* the Executive Branch and Judicial Branches of Federal Government, and the Virginia Courts, have acted outside of their jurisdiction, as well as judicial and ministerial capacity.

In summary, because it is alleged that due to on going malfeasance in office there have been violations of 18 U.S.C. § 4, § 371, and §1001, by the obstruction with Rodriguez-father parental rights in violation of 18 U.S.C. § 1204, this Court must grant certiorari.

Dated: March 26, 2006

Respectfully submitted,

By: 

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OPINION

HARWELL, District Judge:

This appeal presents the question of whether the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610, confers jurisdiction upon federal courts to hear access claims.[1] Petitioner-Appellant, Sarah Claudia Aragon Cantor, appeals the district court's order of April 18, 2005, dismissing her access claims. On May 23, 2005, the district court granted Ms. Cantor's motion for final judgment pursuant to Fed.R.Civ.P. 54(b) on the access claims and for clarification of ruling on the alternative access claim for one of her children referred to herein as A.C. Specifically, when dismissing the access claims, the district court held that it did not have jurisdiction to hear access claims under ICARA. For the following reasons, we affirm the decision of the district court.

I.

Ms. Cantor and Mr. Cohen married in [illegible]. At the time of the marriage, Ms. Cantor and Mr. [illegible] in Israel. During the marriage the couple had four children, R.C., A.C. (the girls), I.C., and Y.C. (the boys), the latter

[1] Under ICARA, the term "rights of access" means visitation rights. 42 U.S.C. § 11602(7).

three of whom are the subject of this appeal.[2] On July 16, 1998, the couple divorced in an Israeli Rabbinical Court and a divorce decree was issued. The divorce decree provided that Mr. Cohen would receive custody of A.C. and I.C., the two oldest children, and Ms. Cantor would retain custody of Y.C. and R.C., the two younger children. The divorce decree also granted visitation rights to Ms. Cantor.

Subsequent to the divorce decree, Ms. Cantor and Mr. Cohen discussed the possibility of the girls being placed with their mother and the boys with their father. Pursuant to this discussion, on September 7, 1998, Ms. Cantor relinquished custody of Y.C. to Mr. Cohen and took custody of A.C. In June 1999, Ms. Cantor filed suit in the Israeli Rabbinical Court, seeking changes to the first divorce decree. In July 1999, Mr. Cohen was ordained as a Rabbi and joined the United States Air Force Chaplaincy. Mr. Cohen was scheduled to attend training school in the United States. On January 2, 2000, a second divorce decree was issued by the Rabbinical Court. The second divorce decree formalized the living situation of the children that Ms. Cantor and Mr. Cohen had earlier agreed upon by granting Ms. Cantor custody of the girls, A.C. and R.C., and granting Mr. Cohen custody of the boys, I.C. and Y.C. The decree provided that Ms. Cantor would have temporary custody of the two boys while Mr. Cohen attended training school (from approximately January 2000 until September 2000).

On July 9, 2002, a third divorce decree was issued by the Rabbinical Court. The third divorce decree provided

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[2]A review of the background information in this matter reveals no less than three orders issued by the Israeli Rabbinical Court which involve the children.

that Ms. Cantor would retain custody over the two girls, and that Mr. Cohen would retain custody over the two boys. The third divorce decree also provided that the two boys and A.C. would live with Mr. Cohen in Germany, where he was stationed with the United States Air Force at the time. The third divorce decree refers to A.C.'s stay in Germany as an "extended visit." The third divorce decree also obligates Mr. Cohen to finance half of the cost of Ms. Cantor's visits to Y.C., I.C., and A.C. in Germany, which were to occur every two months. It also instructed Mr. Cohen to enable the children to call Ms. Cantor three times a week, and to bring the children to Israel to visit Ms. Cantor at least twice a year. This divorce decree attributes the changed custody situation to the security issues in Israel, the educational needs of A.C., and the neurological and the psychological needs of Y.C. However, the decree does not surrender custody of A.C. to Mr. Cohen, nor does it provide a date for A.C.'s permanent return to Israel.

In December 2002, Ms. Cantor and Mr. Cohen had discussions about R.C.'s situation in Israel. Specifically, Ms. Cantor told Mr. Cohen that R.C. missed her siblings and that neither R.C. nor Ms. Cantor liked the school R.C. was attending. As a result, Ms. Cantor and Mr. Cohen agreed that R.C. would move to Germany to live with Mr. Cohen. There is a disagreement among the parties as to when R.C. was to return to Israel.

On March 2, 2004, Mr. Cohen was assigned a brief duty in Qatar and was told to report to the United States upon completion of this duty. On April 17, 2004, Mr. Cohen completed his duty and reported to the United States. Mr. Cohen initially resided with his four children in Pittsburgh, Pennsylvania. On July 11, 2004, all four children moved with Mr. Cohen to Silver Spring, Maryland. Ms. Cantor continues to live in Israel.

On October 22, 2004, Ms. Cantor filed a verified petition in the United States District Court for the District of Maryland for return of the children and access to the children. On November 12, 2004, Mr. Cohen filed a motion to dismiss. On April 18, 2005, the district court found that it lacked jurisdiction to hear Ms. Cantor's access claims and dismissed the complaint insofar as it requests access to I.C. and Y.C. On April 26, 2005, Ms. Cantor filed a motion for final judgment pursuant to Fed.R.Civ.P. 54(b) on the access claims and for clarification of the district court's ruling on the access claim for A.C. On May 18, 2005, Ms. Cantor timely appealed the district court's decision dismissing the access claims. On May 23, 2005, the district court granted Ms. Cantor's motion and certified that its decision dismissing all of the access claims, including the access claim as to A.C., was a final judgment.

II.

The district court found as a matter of law that it lacked jurisdiction to hear the access claims and dismissed those claims. Regardless of whether the dismissal is considered to have been entered under Fed.R.Civ.P. 12(b)(6) or Fed.R.Civ.P. 12(b)(1), we review the decision de novo. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997).

The district court's Fed.R.Civ.P. 54(b) certification is subject to an abuse of discretion standard. *See Curtis-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 10 (1980); *see also Braswell Shipyards, Inc. v. Beazer East, Inc.*, 2 F.3d 1331, 1339 (4th Cir. 1993) (Luttig, J. dissenting) ("[w]e may disturb a trial court's decision to enter judgment under Federal Rule of Civil Procedure 54(b) 'only if [we] can say that its conclusion was clearly unreasonable.'") (quoting *Curtis-Wright*, 446 U.S. at 10). We find the district court's

decision to enter judgment under Fed.R.Civ.P. 54(b) in this case was reasonable and not an abuse of discretion. Accordingly, we possess jurisdiction and will review the Appellant's claims on the merits.

As stated above, this appeal presents the question of whether federal courts are authorized to hear access claims under ICARA. ICARA is the federal legislation which implemented the Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, 19 I.L.M. 1501 (1980) (the "Hague Convention" or "Convention") in the United States.

The Appellant argues the plain language of § 11603(b) of ICARA confers jurisdiction to federal courts to hear access claims. Specifically, § 11603(b) states:

> [a]ny person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

42 U.S.C. § 11603(b).

The Appellant argues this section of the statute unambiguously allows "judicial proceedings" to secure the "effective exercise of rights of access to a child" through "a civil action." *Id.* In support of this argument, the Appellant points out that 42 U.S.C. § 11603(e) establishes a burden of proof with regard to rights of access. The Appellant also notes that 42 U.S.C. § 11603(a) states that the "courts of

the States and United States district courts shall have concurrent original jurisdiction of actions arising under the Convention."

To resolve the issue presented in this appeal we find that we must begin by looking at the implementing language in ICARA, 42 U.S.C. § 11601, *et seq*. We believe the analysis does not begin at 42 U.S.C. § 11603, as suggested by the Appellant, but instead at 42 U.S.C. § 11601. In the initial findings under § 11601(a) particular emphasis is drawn to Congressional concern regarding international abduction or wrongful retention of children. Notably, this section does not mention visitation rights or access rights until the last subsection, subsection 4, and then only mentions these rights in the context of the Convention. Specifically, the subsection describes that "**[t]he Convention** . . . establishes legal rights and procedures for the prompt return of the children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights." 42 U.S.C. § 11601(a)(4) (emphasis added).

Furthermore, subsection (b)(1) of § 11601, which is part of Congress' declarations, states that "[i]t is the **purpose** of this chapter to establish procedures for the **implementation of the Convention** in the United States." 42 U.S.C. § 11601(b)(1) (emphasis added). More importantly, subsection (b)(4) of § 11601, which is also part of Congress' declarations, states that:

> *[t]he Convention and this chapter **empower courts in the United States to determine only rights under the Convention*** and not the merits of any underlying child custody claims.

42 U.S.C. § 11601(b)(4) (emphasis added).

Turning to the language of the Hague Convention itself, the legal rights and procedures contained therein addressing applications for the organization or establishment of rights of visitation are found at Chapter IV entitled "Rights of Access." The Convention sets forth in Article 21:

> An application to make arrangements for organizing or *securing the effective exercise of rights of access may be presented to the Central Authorities* of the Contracting States in the same way as an application for the return of a child.
>
> The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to exercise of such rights.
>
> The *Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings* with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of those rights may be subject.

Hague Convention, art. 21, 19 I.L.M. at 1503 (emphasis added).

Article 21 states that an application may be presented to the Central Authorities for securing the effective exercise of access rights. The Central Authority in

the United States is the Department of State.[3] Notably, Article 21 of the Convention does not provide for presentation to a judicial authority.[4] This is in sharp contrast to Article 12 of the Convention, which addresses wrongful removal or return claims, and specifically refers to the initiation of judicial proceedings and grants judicial authority to provide expedited relief in the case of the wrongful removal or retention of children.[5]

It is in that context that we find that 42 U.S.C. § 11603 must be read, which provides in subsection (b) that:

> *[a]ny person seeking to initiate judicial proceedings under the Convention* for the return of a child *or for arrangements for organizing or securing the effective exercise of rights of access* to a child may do so by commencing a civil action by filing a petition for relief sought in any court *which has jurisdiction of such action* and which is *authorized to exercise its*

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[3]42 U.S.C. § 11606(a) states that "[t]he President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention." President Reagan, by Executive Order No. 12648, 53 Fed.Reg. 30637, designated the Department of State as the Central Authority. The Department of State then promulgated regulations designating the National Center for Missing and Exploited Children as the organization to perform the operational functions with respect to applications under the Convention. See 22 C.F.R. § 94.6.

[4]Article 21 does leave open the possibility that Central Authorities "may initiate or assist in the institution of proceedings."

[5]Article 12 provides that removal claims can also be presented to the administrative (Central) authorities.

> *jurisdiction* in the place where the child is located at the time the petition is filed.

42 U.S.C. § 11603(b) (emphasis added).

As noted above, under the Convention, the Appellant has no right to initiate judicial proceedings for access claims and the federal courts are not authorized to exercise jurisdiction over the access claims brought by the Appellant. It is on this premise that we find, and the district court found, that the courts of the United States lack a substantive basis for the resolution of the access claims asserted by the Appellant.

As additional support of her argument that 42 U.S.C. § 11603(b) confers federal courts jurisdiction to hear access claims, the Appellant cites to 42 U.S.C. § 11601(b)(2) which states that "[t]he provisions of this chapter are in addition to and not in lieu of the provisions of the Convention." However, as discussed above, our interpretation of section 11603(b) of ICARA is consistent with the provisions of the Convention.[6] We also refer once more to 42 U.S.C. § 11601(b)(4) which states that "[t]he Convention and this chapter empower courts in the United States to determine only rights under the Convention . . . ."

Few federal courts have had the occasion to examine the question presented in this case. Indeed, the district court's decision in this case is consistent with the

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[6] Again, the subsection of ICARA upon which the Appellant argues confers jurisdiction to federal courts to hear access claims begins with the language that "[a]ny person seeking to initiate judicial proceedings under the Convention . . . ." 42 U.S.C. § 11603(b) (emphasis added).

reported decisions of five district courts that have so interpreted the federal courts lacking jurisdiction to resolve access claims. *See In re Application of Adams ex. rel. Naik v. Naik,* 363 F. Supp. 2d 1025, 1030 (N.D. Ill. 2005); *Wiggill v. Janicki,* 262 F. Supp. 2d 687, 689 (S.D. W. Va. 2003); *Yi Ly v. Heu,* 296 F. Supp. 2d 1009, 1011 (D. Minn. 2003); *Teijeiro Fernandez v. Yeager,* 121 F. Supp. 2d 1118, 1125 (W.D. Mich. 2000); *Bromley v. Bromley,* 30 F. Supp. 2d 857, 860-61 (E.D. Pa. 1998).

The Appellant acknowledges the decision of these courts, however, she attempts to distinguish this case by arguing that in all of the above cases the petitions for access were only brought and considered under the Convention, and not under ICARA. Yet, this argument is flawed because in all but one of the above cases, the petitions were brought under both. *See Naik,* 363 F. Supp. 2d at 1027 ("Petitioner also claims rights under provisions of the International Child Abduction Remedies Act . . . ."); *Wiggill,* 262 F. Supp. 2d at 688 ("The Wiggell Petition is brought under the Hague Convention and requests rights of access pursuant to Article 21 of the Convention on the Civil Aspects of International Child Abduction . . . as adopted by the International Child Abduction Remedies Act . . . ."); *Id.* at 690 ("While federal courts undoubtedly have jurisdiction under the Convention and ICARA to act where children have been wrongfully removed from their country of habitual residence, that jurisdiction does not extend to access issues and alleged breaches of access rights."); *Teijeiro Fernandez,* 121 F. Supp. 2d at 1119 ("Petitioner . . . filed a verified Petition for Access to Minor Children under the Hague Convention on the Civil Aspects of International Child Abduction . . . and the International Child Abduction Remedies Act . . . ."); *Bromley,* 30 F. Supp. 2d at 858 ("Petitioner . . . brought this action pursuant to Hague Convention on the Civil Aspects of International Child

Abduction of October 25, 1980, and the United States Congress in the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610.").

We also note that in *Bromley*, the Court found additional support of its holding that it did not have jurisdiction over access claims in the State Department's own legal analysis of the Convention and the remedies provided therein for breach of access rights. The State Department found that:

> [u]p to this point this analysis has focussed [sic] on judicial and administrative remedies for removal or retention of children in breach of custody rights. "Access rights," which are synonymous with "visitation rights," are also protected by the Convention, but to a lesser extent than custody rights. While the Convention preamble and Article 1(b) articulate the Convention objective of ensuring that rights of access under the law of one state are respected in other Contracting States, the remedies for breach of access rights are those enumerated in Article 21 . . . .

State Department, 51 Fed.Reg. 10,494, 10,513.

III.

We find additional support for our decision in this case in the long established precedent that federal courts are courts of limited jurisdiction and generally abstain from hearing child custody matters. See Cole v. Cole, 633 F.2d 1083, 1087 (4th Cir. 1980). With the exception of the limited matters of international child abduction or wrongful removal claims, which is expressly addressed by the Convention and ICARA, other child custody matters,

including access claims, would be better handled by the state courts which have the experience to deal with this specific area of the law. This also appears to be the consensus among several of the reported decisions of district courts referenced above. *See Wiggill*, 262 F. Supp. 2d at 690; *Teijeiro Fernandez*, 121 F. Supp. 2d at 1126; *Bromley*, 30 F. Supp. 2d at 862.

With that in mind, we also find it helpful to briefly examine some of ICARA's legislative history. The portion of the legislative materials we cite referen es procedures to implement the Hague Convention:

> Mr. DIXON. The language of the House version of the bill grants original jurisdiction to the courts of the States. At the same time, it states that Federal courts shall "have jurisdiction to the extent authorized by chapter 85 of title 28, United States Code."
>
> In practice, all actions arising under the convention involve interpretation of the Hague Convention Treaty and therefore could be removed to the Federal courts. Therefore, petitions for return under the convention could be heard in either State or Federal courts.
>
> My amendment has the same result by simply granting concurrent original jurisdiction.
>
> The reason that the House constructed this approach was out of concern that these cases would embroil the Federal courts in deciding child custody matters. I must say that I understand this concern, and that none of the proponents of this bill, or my amendment, want to see the Federal courts to be

involved in deciding the underlying custody disputes. This bill has been carefully drafted to avoid this possibility. Section 2(b)(4) provides that "the convention and this act empower courts in the United States to determine only rights under the convention and not the merits of any underlying child custody claims." This language limits consideration to only those issues specifically contained in the Hague Convention, and not to child custody in general.

The reason I believe it is important to amend the House language regarding jurisdiction is that the complexity of the House language could very likely result in an endless series of litigation regarding whether the Federal court can hear each specific case. One of the primary purposes of this implementing legislation is to define a clear and consistent set of procedures for upholding our obligations under the Hague Convention. I believe that the goal would be better served through clear language on this sensitive matter of jurisdiction. This point was most recently clarified in the Supreme Court's decision of Thompson versus Thompson issued January 12, 1988. That case underscores the value of expressly providing the intent of Congress. My amendment would have the same practical effect as the house language, however, it is clearer and would avoid needless litigation which could delay the rightful return of a child to its custodial parent.

Procedures to Implement the Convention on the Civil Aspects of International Child Abduction, 134 Cong. Rec. S3839, 3839-40 (daily ed. April 12, 1988) (statement of Sen. Dixon) (emphasis added).

Sen. Hatch from Utah spoke in response to the offer of the amendment to express concerns with respect to the language:

> Mr. Hatch. This is a measure that has previously passed the Senate and in this Congress there is a companion bill currently before the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee. In relation to the committee's consideration of this issue, I recently received communications from Conference of Chief Justices and the Department of Justice that they, along with the Judicial Conference of the United States, believe that "State courts should have exclusive jurisdiction in all legal actions under the convention."
>
> The concern raised by these organizations is based on the fact that child custody matters have traditionally been issues handled exclusively by State courts and not within the expertise of the Federal courts. Given their concerns, I decided to closely examine the issue. Quite frankly, it is a close call. While child custody has traditionally been a State court matter, the interpretation of treaties with foreign countries is a responsibility of the Federal courts under section 2 of article III of the Constitution. In the case at hand, we have a treaty with an underlying concern of child custody. Thus, the issues of treaty interpretation and child custody are inseparable [sic] combined.
>
> Mr. President, it is my understanding that the sponsors of this bill are aware of these concerns, and that they have attempted to address them in a responsible manner in the language of the bill. At

> this time I would like to pose a few questions to my distinguished colleague from Illinois in order to help clarify the matter.
>
> **Am I correct in my understanding that the bill has been drafted so as to limit consideration by the courts to only those issues specifically contained in the Hague Convention on the Civil Aspects of International Child Abduction,** and not to child custody in general?
>
> Mr. DIXON. Yes. Section 2(b)(4) of H.R. 3971 provides that "the Convention and this Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims."

Id. at 3841 (statements of Sen. Hatch and Sen. Dixon) (emphasis added).

Finally, written comments submitted by Sen. Simon, provide in pertinent part:

> Mr. Simon. This is the third time the Senate has taken up the matter of the Hague Convention and has addressed the problem of the abduction, or wrongful retention, of children overseas in custody related disputes. On October 9, 1986, the Senate voted unanimously to give its advice and consent to ratification of the Convention. In June 1987, I introduced S. 1347, a bill drafted by the Administration to implement the Convention. The enactment of this legislation is the last remaining barrier to ratification by the United States. It will insure that the provisions of the Convention are carried out in a manner that is consistent with the

> **intent of the Convention's negotiators in the context of our legal system.** On October 8, 1987, the Senate adopted the text of S. 1347 as an amendment to the State Department authorization bill, H.R. 1777. The Amendment was deleted in conference at the request of the Chairman of the House Judiciary Committee that they be given an opportunity to consider the legislation in hearings before that Committee.
>
> Both the House and the Senate have now held hearings on this measure, and technical clarifications have been made to the language of S. 1347 through H.R. 3971. In only one area — that of original court jurisdiction — is there a substantial need to clarify the language of H.R. 3971 to conform to the intent of the sponsors of the Senate bill, and my colleague from Illinois is offering that needed amendment. The Amendment will restore the language of S. 1347 calling for concurrent jurisdiction in State and Federal Courts to hear proceedings arising under the Convention and this legislation.
>
> **The language of this amendment should not raise a concern to Federal Judges that they will be moving into child custody matters traditionally in the jurisdiction of State Courts.**

Id. at 3841-42 (statement of Sen. Simon) (emphasis added).

We note that in this legislative history there is no mention of any separate rights apart from those set forth in the Hague Convention.

This court also finds that a common sense approach to the issue at hand provides us guidance. We point out that § 11603(e)(2) of ICARA and Articles 12, 13, and 20 of the Convention provide for several affirmative defenses a court can consider when dealing with wrongful removal claims. [7] However, there are no provisions in either ICARA or the Convention which provide defenses to access claims. It is difficult to believe that federal courts could entertain access

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[7] If a Respondent can prove any of the following affirmative defenses a court can refuse to order the return of a child:

> that there is a grave risk that returning the child to the petitioner would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;
>
> that returning the child to the petitioner would not be permitted by the fundamental principals of the United States relating to the protection of human rights and fundamental freedom;
>
> that the petitioner's action for return was not commenced within one year of the wrongful retention and that the child is well-settled in the United States;
>
> that the petitioner was not actually exercising the custody rights at the time of retention or had consented to or subsequently acquiesced in the retention; or
>
> that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

See 42 U.S.C. § 11603(e)(2); Hague Convention, arts. 12, 13, and 20, 19 I.L.M. at 1502-03.

claims, yet would be left powerless to consider any defenses which concern the safety or the best interests of a child. For example, how would a federal court deal with a situation where it exercised jurisdiction over an access claim, yet the court could not consider the fact that a child's life may be in danger by the enforcement of an access right?[8] For this reason as well, we find federal courts lack jurisdiction to hear access claims. By contrast, a state court would have the ability to weigh the children's interests, the parent's interests, and other familial considerations. Therefore, we find it best not to move domestic relations litigation to federal courts.

IV.

The Appellant also cites this court's decision in *Katona v. Kovacs*, No. 04-2040 (4th Cir. Aug. 31, 2005), in support of her argument that federal courts have jurisdiction to hear access claims. We initially note that *Katona* is an unpublished case and pursuant to Local Rule 36(c) unpublished opinions are not binding precedent in this circuit. However, the issue presented in this case is not the same as the one presented to the court in *Katona*. In *Katona*, the question presented was whether the district court erred in denying a petition for the return of children pursuant to the Hague Convention and its implementing legislation, the International Child Abduction Remedies Act. The court held in Katona that "[b]ecause the record before this court fails to demonstrate whether Katona established a wrongful removal or whether his former wife, Magdonla

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[8]We note that access rights, "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Hague Convention, art. 5, 19 I.L.M. at 1501.

Kovacs, has an adequate defense to the petition, we vacate the judgment and remand for further proceedings." Id. at 2.

The court went on to make a distinction between the remedies available when considering rights of custody from the remedies available in cases concerning rights of access or visitation. The court explained that:

> [w]hile the remedy for violating rights of custody requires the child's return to the country of habitual residence, the remedies for violating rights of access are less drastic, such as "ordering that the custodial parent who removed the child from the child's habitual residence reimburse the other parent for expenses incurred in exercising his or her rights of access."

Id. at 4 (quoting *Whallon v. Lynn*, 230 F.3d 450, 455 n. 3 (1st Cir. 2000)). The court held that should the district court determine on remand "from the evidence that Katona has only a right of access, it should craft a remedy within the context of the Convention to ensure Katona can exercise that right." *Id.* at 5 (emphasis added).[9]

We note that the *Whallon* case cited by the court in *Katona*, is a case which only addressed a wrongful removal claim. The court in *Whallon* stated the following in a footnote:

> [w]hile the Hague Convention provides remedies

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[9]As previously noted, the Convention only provides jurisdiction to "the Central Authorities" to remedy situations involving rights of access.

> for a violation of access rights, *see id.*, art. 21, 19 I.L.M. at 1503, such remedies do not include an order of return to the place of habitual residence. Rather such remedies include, inter alia, ordering that the custodial parent who removed the child from the child's habitual residence reimburse the other parent for expenses incurred in exercising his or her rights of access. *Id.* art. 26, 19 I.L.M. at 1503-04.

Whallon, 230 F.3d at 455 n. 3. Notably, the court in *Whallon* first cites to Article 21 of the Convention when referring to remedies for a violation of access rights. As discussed above, Article 21 provides that an application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities, Article 21 does not provide for a judicial remedy.

The court in *Whallon* next cites to Article 26 of the Convention when referring to a remedy of requiring reimbursement of expenses. Article 26 of the Convention is found at Chapter V entitled "General Provisions." Article 26 sets forth:

> Each Central Authority shall bear its own costs in applying this Convention.
>
> Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment

> of expenses incurred or to be incurred in implementing the return of a child.
>
> However, a Contracting state may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advise.
>
> Upon ordering the return of a child or issuing an order concerning rights of access *under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses* incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Hague Convention, art. 26, 19 I.L.M at 1503-04 (emphasis added).

In order to find consistency with Article 21, we interpret this section of the Convention to permit administrative authorities [the Central Authorities] to direct the person who prevented the exercise of "rights of access" to pay necessary expenses. Also, consistent with Article 12, judicial or administrative authorities are permitted under this section to direct the person who "removed or retained" a child to pay necessary expenses.

V.

We note that our decision does not leave the Appellant without a remedy for the exercise of her access rights. The Convention does not prevent the Appellant from filing a claim for visitation in state court under the state's visitation law. *See* Hague Convention, arts. 29 & 34, 19 I.L.M. at 1504; *see also Wiggill,* 262 F. Supp. 2d at 690; *Teijeiro Fernandez,* 121 F. Supp. 2d at 1126; *Bromley,* 30 F. Supp. 2d at 862. Additionally, as discussed above, the Appellant may file a petition with the Central Authorities pursuant to the Convention in order to address her access claims.

For the reasons stated herein, the district court is affirmed. To hold otherwise would be contrary to Congress' declaration that ICARA is intended to "empower courts in the United States to determine only rights under the Convention . . . ." 42 U.S.C. § 11601(b)(4).

AFFIRMED

TRAXLER, Circuit Judge, dissenting:

For the reasons set forth below, I would hold that the district court has jurisdiction and I would remand this case for further proceedings.

I.

Cantor brought this action under the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C.A. §§ 11601-11611 (West 2005), which is the implementing legislation for the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention"), Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M.

1501. Article 1 of the Hague Convention posits two fundamental objectives: (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State"; and (2) "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States." As we explained in *Miller v. Miller*, 240 F.3d 392 (4th Cir. 2001):

> In adopting the Hague Convention, the signatory nations sought to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access. That is, the primary purpose of the Hague Convention is to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court.

Id. at 398 (internal citations and quotation marks omitted). The Hague Convention aims to have judicial authorities decide whether a child has been wrongfully removed or retained in violation of existing custody rights, or whether existing access rights are being violated, not whether the petitioning parent is better suited to serve as custodian. *See, e.g., Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005) (explaining the "adjudication of a Hague Convention Petition" is distinct from "[c]ustody litigation in state court [that] revolves around findings regarding the best interest of the child"), *petition for cert. filed*, 74 U.S.L.W. 3337 (U.S. Nov. 29, 2005) (No. 05-697). The Hague Convention limits judicial authorities to considering claims for return of a child or to secure the exercise of access rights and forbids courts to revisit the merits of the underlying custody decision. *See* Hague Convention, art. 16, 19 I.L.M. at 1503;

cf. *Miller*, 240 F.3d at 398 (explaining that "[t]he merits of any underlying custody case are not at issue" in an action brought under the Hague Convention) (internal quotation marks omitted).

For purposes of this case, the significance of the Hague Convention's purpose, as reflected in the Preamble and Article 1, is that the Contracting States sought to protect and foster respect for *two categories* of legal rights — rights of custody and rights of access. The Convention defines "rights of custody" as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Hague Convention, art. 5(a), I.L.M. at 1501. "Rights of access" are essentially visitation rights enjoyed by the non-custodial parent, specifically including "the right to take a child for a limited period of time to a place other than the child's habitual residence." Hague Convention, art. 5(b), 19 I.L.M. at 1501.

By enacting ICARA, Congress implemented the Hague Convention, giving it the force of law in the United States.[1] Congress incorporated into ICARA the primary

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[1]"International treaties are not presumed to create rights that are privately enforceable" without enabling legislation from Congress. Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992); see Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984). "An international agreement of the United States is 'non-self-executing' . . . if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation." Restatement (Third) of Foreign Relations Law § 111(4)(a). Article 2 of the Hague Convention directs "Contracting States [to] take all appropriate measures to secure within their territories the implementation

objectives of the Hague Convention with respect to both classes of rights, finding that the Convention "establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights." 42 U.S.C.A. § 11601(a)(4). The express purpose of ICARA is "to establish procedures for the implementation of the Convention in the United States." 42 U.S.C.A. § 11601(b)(4). ICARA "empower[s] courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims." 42 U.S.C.A. § 11601(b)(4). On its face, the unqualified phrase "rights under the Convention" encompasses "rights of access" as well as "rights of custody."

Under ICARA's "Judicial remedies" provision, federal courts enjoy concurrent original jurisdiction with the state courts over "actions arising under the Convention." 42 U.S.C.A. § 11603(a). Section 11603 expressly contemplates that such actions may include not only claims for the return of a child being held in violation of custody rights, but also claims "for organizing or securing the effective exercise of rights of access." 42 U.S.C.A. § 11603(b). A straightforward reading of this provision suggests that ICARA affords aggrieved parents a judicial forum for resolving claims that involve either custody rights or access rights:

> Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the

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of the objects of the Convention." Such language does not evidence an intent that the agreement be self-executing; congressional action was thus necessary. See Auguste v. Ridge, 395 F.3d 123, 132 n.7 (3d Cir. 2005).

> effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

42 U.S.C.A. § 11603(b). ICARA establishes a preponderance of the evidence standard of proof for petitions filed under section 11603(b), regardless of whether the petition is for the return of a child or for securing the exercise of access rights. See 42 U.S.C.A. § 11603(e)(1). The statute, however, makes a distinction between these two types of claims with respect to petitioner's prima facie case. When the petition seeks the return of a child, the petitioner must prove by a preponderance of evidence that "the child has been wrongfully removed or retained within the meaning of the Convention." 42 U.S.C.A. § 11603(e)(1)(A).[2] When the petition seeks to secure "the effective exercise of rights of access," the petitioner must prove by a preponderance of evidence simply that he "has such rights." 42 U.S.C.A. § 11603(e)(1)(B).

Cantor commenced this action under ICARA asserting both types of claims. She alleged her daughters were removed or retained in contravention of her custody rights

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[2]In order to demonstrate wrongful removal or retention within the meaning of Article 3 of the Hague Convention, the petitioner must prove that the children were "'habitually resident'" in the country from which they were removed, that "the removal was in breach of [the petitioner's] custody rights," and that the petitioner "had been exercising those rights at the time of removal." *Miller*, 240 F.3d at 398; *see* Hague Convention, art. 3, 19 I.L.M. at 1501 (defining "wrongful" removal).

and sought the return of the girls to Israel. She did not assert custody rights as to her two sons, but she alleged that she was being denied the effective exercise of her rights of access to the boys. For purposes of this appeal, however, we are concerned only with the petition as it relates to Cantor's access rights. The district court dismissed Cantor's petition to the extent that it sought enforcement of her alleged access rights, concluding that federal courts do not have jurisdiction to adjudicate such a claim because the Hague Convention "provides for no . . . recourse to judicial authority" for claims involving access rights. J.A. 28. The district court concluded that, under Article 21 of the Hague Convention, the non-custodial parent's only recourse for an alleged breach of access rights is to file an application with the Central Authority of the country in which the child is located. By contrast, the district court noted, the Hague Convention establishes "action by the 'judicial or administrative authority'" as the standard "remedy" for a claim of wrongful removal in breach of custody rights. J.A. 28. The district court limited its analysis to the language of the Hague Convention and did not address the effect, if any, of ICARA. Having concluded that there is no judicial forum in which Cantor can raise her denial of access rights claim, the district court dismissed for lack of jurisdiction.

The result reached by the district court is consistent with a substantial line of district court decisions holding that federal courts have no jurisdiction to adjudicate claims involving access rights. See, e.g., *Ly v. Heu*, 296 F. Supp. 2d 1009, 1010-11 (D. Minn. 2003); *Wiggill v. Janicki*, 262 F. Supp. 2d 687, 689 (S.D.W. Va. 2003); *Fernandez v. Yeager*, 121 F. Supp. 2d 1118, 1125-26 (W.D. Mich. 2000); *Bromley v. Bromley*, 30 F. Supp. 2d 857, 860 (E.D. Pa. 1998). These decisions answer the jurisdictional question solely by reference to the text of the Hague Convention rather than the implementing statute, often relying upon

ICARA's language that federal courts have "jurisdiction of actions *arising under the Convention*," 42 U.S.C.A. § 11603(a) (emphasis added), and that ICARA's provisions "are in addition to and not in lieu of the provisions of the Convention." 42 U.S.C.A. § 11601(b)(2). In turn, the lower courts uniformly have concluded, based on a comparison of Article 12 (addressing the return of a wrongfully removed child) and Article 21 (addressing rights of access), that the Hague Convention does not provide either (1) a judicial forum to resolve disputes regarding access rights or (2) a substantive remedy for the denial of access rights. *See, e.g., Ly*, 296 F. Supp. 2d at 1011 (noting "[t]he lack of parallelism between Article 12 and Article 21 has led the district courts that have considered the issue to conclude that the Convention creates no judicial power to enforce rights of access"). As stated in *Ly*, which is fairly representative of this line of decisions,

> [t]here is . . . reason to doubt that the Convention provides a judicial remedy for violations of a parent's visitation rights. Article 12 of the Convention, which addresses procedures to effectuate the return of a wrongfully removed child, specifically refers to action by the "judicial or administrative authority" of a member nation. See Hague Convention, art. 12. In contrast, Article 21 of the Convention, which deals with "organizing or securing the effective exercise of rights of access" to a child, makes no mention of recourse to a judicial authority. Hague Convention, art. 21. Rather, a parent must apply to the "Central Authorit[y]" of a nation to secure enforcement of his or her rights of access.

Id. at 1010-11. This view of Article 21 is consistent with scholarly commentary criticizing the failure of the Hague

Convention to provide a clear substantive remedy for non-custodial parents who are being denied their rights of access under the Hague Convention. *See, e.g.*, Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 Tx. Int'l L. J. 41, 48-49 (2003) (explaining that "enforcement of access rights" is "a serious deficiency in the Convention"); Note, *Croll v. Croll and the Unfortunate Irony of the Hague Convention on the Civil Aspects of International Child Abduction: Parents with "Rights of Access" Get No Rights to Access Courts*, 30 Brook. J. Int'l L. 641 (2005). *See also Bromely*, 30 F. Supp. 2d at 861 n.5 (collecting articles).

II.

Despite the weight of authority, I am unconvinced, based on the language of ICARA, that federal courts lack jurisdiction to adjudicate Cantor's claim. In my view, even assuming for analytical purposes that the Hague Convention itself does not afford the non-custodial parent a judicial forum to enforce his rights to access, Congress nevertheless has done so.

In determining whether a judicial forum exists for the enforcement of access rights, I would not relegate the analysis solely to the text of the Hague Convention but instead would begin with the language of ICARA's judicial remedies provision and refer to the language of the Convention to inform my understanding of ICARA. The Convention is not self-executing and therefore "do[es] not create judicially-enforceable rights unless . . . first given effect by implementing legislation." *Ridge*, 395 F.3d at 132 n.7; *see Restatement (Third) of Foreign Relations Law* § 111(3) ("Courts in the United States are bound to give effect to . . . international agreements of the United States,

except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation."). Congress gave the Convention domestic legal effect through ICARA, requiring the primary focus for purposes of jurisdiction to be on the statutory language:

> The issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute. The treaty has no independent significance in resolving such issues, but is relevant insofar as it may aid in the proper construction of the statute. Thus, where courts have been persuaded as to the proper interpretation of an implementing statute, that judgment has not been affected by the claim that the reading given the statute was inconsistent with the intent of the parties to the treaty.

Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980); *see Restatement (Third) of Foreign Relations Law* § 111 comment h (explaining that "it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States"). If a preexisting treaty and a subsequent act of Congress cannot be construed consistently, allowing both to remain valid law, "the statute to the extent of conflict renders the treaty null" in the domestic context. *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (internal quotation marks omitted).

As I noted previously, section 11603(b) unquestionably permits — in straightforward and unambiguous language — judicial proceedings alleging the wrongful removal of a child in violation of custody rights or the denial of the non-custodial parent's rights of access to the child, or both. See 42 U.S.C.A. § 11603(b). ICARA directs a person "seeking to initiate judicial proceedings

under the Convention for the return of a child *or for arrangements for organizing or securing the effective exercise of rights of access*" to "commenc[e] a civil action . . . in any court which has jurisdiction of such action." Id. (emphasis added). I cannot find anything in the statutory text or its structure that would permit me to excise petitions to secure the effective exercise of access rights from the scope of the judicial remedies provision. This conclusion is underscored, in my view, by the creation of separate proof requirements for custody rights and access rights "in an action brought under subsection (b) of [the Judicial remedies] section." 42 U.S.C.A. § 11603(e)(1).[3] The unambiguous language of this section does not mandate that a claim for access rights be pursued administratively via the Central Authority. Rather, it clearly provides a judicial forum for such a claim, and "when the terms of a statute are clear and unambiguous, [a court's] inquiry ends," leaving only a "duty of enforcing the terms of the statute as Congress has drafted it." *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 305 (4th Cir.

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[3]Subsection (e) provides in relevant part: **(e) Burdens of proof**

(1) A petitioner *in an action brought under [section 11603(b)]* shall establish by a preponderance of the evidence—

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained . . .; and

(B) *in the case of an action* for arrangements for organizing or securing the effective exercise of *rights of access*, that the petitioner has such rights.

42 U.S.C.A. § 11603(e)(1) (emphasis added).

2000), aff'd sub nom. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002).

Despite the foregoing, Cohen would look solely to the Convention to determine whether a judicial forum is available to Cantor. Cohen argues that ICARA does not add to the remedies set forth in the Hague Convention any additional means by which an aggrieved parent can enforce existing access rights. He relies on the preamble to ICARA which declares that the purpose of ICARA is "to establish procedures for the implementation of the Convention in the United States" and that "[t]he Convention and [ICARA] empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims." 42 U.S.C.A. § 11601(b)(1) and (4). Because ICARA authorizes courts to adjudicate "only rights under the Convention," Cohen argues, we must refer to the language of the Convention to determine whether jurisdiction exists to adjudicate this claim. In turn, Article 21 makes no provision for the initiation of judicial proceedings to determine rights of access.

I cannot subscribe to Cohen's argument. First, it runs contrary to settled principles of statutory construction by elevating a general policy statement in the preamble over the operative portions of ICARA. "[P]reambles in statutes . . . are to be looked at best only when . . . the enacting language is unclear or ambiguous." *White v. Investors Mgm't Corp.*, 888 F.2d 1036, 1042 (4th Cir. 1989). If "the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble." Id. (quoting *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 885 (4th Cir. 1984)); *see Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999). The language in ICARA's Judicial remedies

section is unambiguous and cannot be altered by the general policy pronouncements in the preamble.

Furthermore, the language of the preamble in any case does not preclude a judicial remedy. ICARA declares that courts are empowered "to determine only rights under the Convention." The Convention, however, identifies only two classes of substantive rights — custody rights and access rights. ICARA does not create new rights or expand these rights as they are defined in Article 5 of the Convention, which is made clear by the preamble's reference to the policy against disturbing the merits of an underlying order. See 42 U.S.C.A. § 11601(b)(4). Distinct from these substantive rights under the Convention are the judicial or administrative proceedings used to secure these rights. Congress did not, in its policy declaration upon which Cohen relies, declare that the "proceedings" or "procedures" provided by the Convention would determine whether courts have jurisdiction to adjudicate claims based on rights under the Convention. In my view, therefore, the creation of a judicial forum under ICARA for the securing of access rights is not inconsistent with the congressional declarations of purpose in the preamble. Indeed, the preamble declares that "[t]he provisions of [ICARA] are in addition to and not in lieu of the provisions of the Convention." 42 U.S.C.A. 11601(b)(2).

Finally, Cohen argues that the unambiguous language of section 11603(b) does not permit an action in federal court because there is no substantive remedy even if a court were to determine that rights of access were being denied. Even though ICARA grants concurrent state and federal jurisdiction, see 42 U.S.C.A. § 11603(a), Cohen suggests that the language indicating a petition may be filed "in any court which has jurisdiction of such action" refers only to remedies and procedures available in family court.

which is historically the appropriate forum for visitation matters to be decided. See Bromley, 30 F. Supp. 2d at 862; Wiggill, 262 F. Supp. 2d at 690. According to Bromley, federal courts lack jurisdiction because there is no substantive remedy under the Convention; "the proper jurisdiction for [such an] action is a state court that has the full authority to enforce and modify the original . . . decree." 30 F. Supp. 2d at 861.

The first problem with this view of section 11603(b) is that it contradicts Cohen's argument that the Convention does not afford a judicial forum to ensure the exercise of access rights. He concedes, as he must, that the language set forth in ICARA does indeed provide a judicial forum. But ICARA draws absolutely no distinction between state and federal courts in this regard. Moreover, contrary to the assumption that an action to secure access rights will force federal courts into the business of domestic law, the inquiry called for under section 11603(e) is very limited — the court need only decide whether "the petitioner has such rights" of access. 42 U.S.C.A. § 11603(e)(1)(B). Where Congress has clearly established a cause of action, the district court has the power to fashion an appropriate order that returns the parties to the status quo according to the existing rights of the parties. *See Barnes v. Gorman*, 536 U.S. 181, 189 (2002) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.") (internal quotation marks omitted). This limited inquiry does not require federal courts to plumb the depths of family law; in fact, it requires no greater degree of entanglement with family law than does the determination of whether a child has been removed in violation of existing custody rights. Such a limited inquiry is consistent with Convention policy goals that the status quo be returned rapidly, without regard to

the underlying merits, and enforced until a court of competent jurisdiction revisits the merits.

III.

For these reasons, I would conclude that our jurisdictional inquiry is governed by the unambiguous terms of ICARA, and that under ICARA federal courts may adjudicate claims to secure the exercise of access rights. Accordingly, I respectfully dissent.